DOCKET

No. 08-305
Title: Forest Grove School District, Petitioner
v.
T. A.
Docketed: September 8, 2008
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (05-35641)
Decision Date: April 28, 2008
Rehearing Denied: June 5, 2008
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Sep 3 2008	Petition for a writ of certiorari filed. (Response due October 8, 2008)
Sep 18 2008	Waiver of right of respondent T. A. to respond filed.
Oct 1 2008	DISTRIBUTED for Conference of October 17, 2008.
Oct 2 2008	Response Requested . (Due November 3, 2008)
Oct 6 2008	Brief amici curiae of National School Boards Association, et al. filed.
Oct 7 2008	Order extending time to file response to petition to and including December 3, 2008.
Dec 3 2008	Brief of respondent T. A. in opposition filed.
Dec 16 2008	Reply of petitioner Forest Grove School District filed. (Distributed)
Dec 17 2008	DISTRIBUTED for Conference of January 9, 2009.
Jan 12 2009	DISTRIBUTED for Conference of January 16, 2009.
Jan 16 2009	Petition GRANTED The brief of petitioner is to be filed on or before Wednesday, February 25, 2009. The brief of respondent is to be filed on or before Wednesday, March 25, 2009. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court.
Feb 25 2009	Joint appendix filed. Statement of costs received.
Feb 25 2009	Brief of petitioner Forest Grove School District filed.
Feb 25 2009	Consent to the filing of amicus curiae briefs in support of either or neither party received from counsel for the petitioner.
Feb 25 2009	Consent to the filing of amicus curiae briefs in support of either or neither party received from counsel for the respondent.
Mar 3 2009	Brief amicus curiae of New York State School Boards Association filed.
Mar 3 2009	Brief amicus curiae of City of New York filed.
Mar 4 2009	Brief amicus curiae of Council of the Great City Schools filed.
Mar 4 2009	Brief amici curiae of U.S. Conference of Mayors, et al. filed.
Mar 4 2009	Brief amicus curiae of National Education Association filed.
Mar 4 2009	Brief amici curiae of National School Boards Association, et al. filed.
Mar 10 2009	Record received from U.S.C.A. 9th Circuit. (1 envelope)
Mar 12 2009	Record received from U.S.D.C. for the District of Oregon. (1 box)
Mar 19 2009	CIRCULATED.
Mar 23 2009	SET FOR ARGUMENT ON Tuesday, April 28, 2009.
Mar 25 2009	Brief of respondent T. A. filed. (Distributed)
Mar 31 2009	Brief amicus curiae of United States filed. (Distributed)

Apr 1 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Apr 1 2009	Brief amici curiae of Disability Rights Legal Center, et al. filed. (Distributed)
Apr 1 2009	Brief amici curiae of National Disability Rights Network, et al. filed. (Distributed)
Apr 1 2009	Brief amicus curiae of Autism Speaks filed. (Distributed)
Apr 1 2009	Brief amicus curiae of Council of Parent Attorneys and Advocates filed. (Distributed)
Apr 6 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 21 2009	Reply of petitioner Forest Grove School District filed. (Distributed)
Apr 28 2009	Argued. For petitioner: Gary S. Feinerman, Chicago, Ill. For respondent: David B. Salmons, Washington, D.C.; and Eric D. Miller, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

~~Name~~~~~~~~~~~~~~~~~~~~~~~~	~~~~~~~~Address~~~~~~~~~~~~~~~~~~~~	~~Phone~~~
Attorneys for Petitioner:		
Gary Feinerman Counsel of Record	Sidley Austin LLP One South Dearborn Street Chicago, IL 60603 gfeinerman@sidley.com	(312) 853-2174
Party name: Forest Grove School District		
Attorneys for Respondent:		
David B. Salmons Counsel of Record	Bingham McCutchen LLP 2020 K Street, NW Washington, DC 20006 david.salmons@bingham.com	(202) 373-6000
Party name: T. A.		
Mary E. Broadhurst	P.O. Box 11377 Eugene, OR 97440	(541) 683-8530
Party name: T. A.		
Terri D. Keville	Davis Wright Tremaine LLP 865 South Figueroa Street, Suite 2400 Los Angeles, CA 90017	(213) 633-6800
Party name: Disability Rights Legal Center, et al.		
Bonnie I. Robin-Vergeer	Public Citizen Litigation Group 1600 20th Street, N.W. Washington, DC 20009	(202) 588-1000
Party name: T. A.		
Other:		

Seth M. Galanter	Morrison & Foerster LLP 2000 Pennsylvania Ave., NW Washington, DC 20006	(202) 887-1500

Party name: National Disability Rights Network, et al.

Ankur J. Goel	McDermott Will & Emery LLP 600 Thirteenth Street NW Washington, DC 2005	(202) 756-8000

Party name: Council of Parent Attorney and Advocates

Julie Wright Halbert	Council of Great City Schools 1301 Pennsylvania Avenue NW Suite 702 Washington, DC 2004	(202) 393-2427

Party name: Council of the Great City Schools

Elena Kagan	Solicitor General United States Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530-0001	(202) 514-2217

Party name: United States

Leonard J. Koerner	Corporation Counsel for the City of New York NYC Law Department 100 Church Street New York, NY 10007 lkoerner@law.nyc.gov	(212) 788-1010

Party name: City of New York

Eric David Miller	Assistant to the Solicitor General Department of Justice 950 Pennsylvania Ave N.W Room 5634 Washington, DC 20530	(202)-514-4063

Party name: Forest Grove School District v. T. A.

Robert H. Pees	Akin Gump Strauss Hauer & Feld LLP One Bryant Park New York, NY 10036	(212) 872-1000

Party name: Autism Speaks

Richard Ruda	State and Local Legal Center	(202) 434-4850

444 North Capitol Street, N.W.,
Suite 309
Washington, DC 20001

Party name: U.S. Conference of Mayors, et al.

Maree F. Sneed — Hogan & Hartson LLP — (202) 637-6416
555 Thirteenth Street, N.W.
Washington, DC 20004

Party name: National School Boards Association, et al.

John M. West — Bredhoff & Kaiser, P.L.L.C. — (202) 842-2600
805 Fifteenth Street, N.W.
Suite 1000
Washington, DC 20005
www.bredhoff.com

Party name: National Education Association

Jay Worona — New York State School Boards Assn. — (518) 783-0200
24 Century Hill Drive
Latham, NY 12210-2125

Party name: New York State School Boards Association

PETITION FOR WRIT OF CERTIORARI

103

Supreme Court, U.S.
FILED

SEP 3 - 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

No. 08-308

IN THE

Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,

Petitioner,

v.

T.A.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

EAMON P. JOYCE
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300

GARY FEINERMAN*
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

RYAN C. MORRIS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

RICHARD COHN-LEE
ANDREA L. HUNGERFORD
THE HUNGERFORD LAW FIRM, LLP
P.O. Box 3010
Oregon City, OR 97045
(503) 650-7990

Counsel for Petitioner

*Counsel of Record

September 3, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

This case presents the question on which the Court granted certiorari, but was unable to resolve, in *Board of Education* v. *Tom F. ex rel. Gilbert F.*, 128 S. Ct. 1 (2007) (per curiam):

Whether the Individuals with Disabilities Education Act permits a tuition reimbursement award against a school district and in favor of parents who unilaterally place their child in private school, where the child had not previously received special education and related services under the authority of a public agency.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
I. STATUTORY BACKGROUND	2
II. FACTUAL AND PROCEDURAL BACKGROUND	4
REASONS FOR GRANTING THE WRIT	11
I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE RECOGNIZED CIRCUIT SPLIT ON THE QUESTION PRESENTED	11
II. THE NINTH CIRCUIT'S DECISION MISINTERPRETS IDEA AND CONFLICTS WITH THIS COURT'S SPENDING CLAUSE JURISPRUDENCE	14
CONCLUSION	21
APPENDIX A: *Forest Grove Sch. Dist.* v. *T.A.*, 523 F.3d 1078 (9th Cir. 2008)	1a
APPENDIX B: *Forest Grove Sch. Dist.* v. *T.A.*, No. CV 04-331-MO (D. Or. May 11, 2005)	25a
APPENDIX C: *Education of T.A.* v. *Forest Grove Sch. Dist.*, OAH Case No 20031306 (Or. Superintendent of Pub. Educ. Jan. 26, 2003)	56a

TABLE OF CONTENTS continued

Page

APPENDIX D: Forest Grove Sch. Dist. v. T.A., No. 05-35641 (9th Cir. June 5, 2008) (order denying reh'g and reh'g en banc) 160a

APPENDIX E: Federal Statutes 161a

TABLE OF AUTHORITIES

CASES Page

Arlington Cent. Sch. Dist. Bd. of Educ. v. *Murphy*, 548 U.S. 291 (2006) 2, 15, 18, 19
Balt. City Bd. of Sch. Comm'rs v. *Taylorch*, 395 F. Supp. 2d 246 (D. Md. 2005) 13
Bd. of Educ. v. *Tom F. ex rel. Gilbert. F.*, 127 S. Ct. 1393 (2007) 1
Bd. of Educ. v. *Tom F. ex rel. Gilbert. F.*, 128 S. Ct. 1 (2007) 2
Chevron, U.S.A., Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 19
D.L. ex rel. J.L. v. *Springfield Bd. of Educ.*, 536 F. Supp. 2d 534 (D.N.J. 2008) 14
Frank G. v. *Bd. of Educ.*, 459 F.3d 356 (2d Cir. 2006), *cert. denied*, 128 S. Ct. 436 (2007) 10, 11, 20
Greenland Sch. Dist. v. *Amy N.*, 358 F.3d 150 (1st Cir. 2004) 10, 12, 13
J.S. ex rel. R.S. v. *S. Orange/Maplewood Bd. of Educ.*, No. 06-3494 (FSH), 2008 WL 820181 (D.N.J. Mar. 26, 2008) 13
Justin G. ex rel. Gene R. v. *Bd. of Educ.*, 148 F. Supp. 2d 576 (D. Md. 2001) 14
Lauren W. ex rel. Jean W. v. *Deflaminis*, 480 F.3d 259 (3d Cir. 2007) 12
Lunn v. *Weast*, No. 05-2363, 2006 WL 1554895 (D. Md. May 31, 2006) 13
M.M. ex rel. C.M. v. *Sch. Bd.*, 437 F.3d 1085 (11th Cir. 2006) 12
Morales v. *Trans World Airline, Inc.*, 504 U.S. 374 (1992) 17
Morton v. *Mancari*, 417 U.S. 535 (1974) 17
Pennhurst State Sch. & Hosp. v. *Halderman*, 451 U.S. 1 (1981) 18

TABLE OF AUTHORITIES continued

Page

Riegel v. *Medtronic, Inc.*, 128 S. Ct. 999 (2008) 18
Sch. Comm. of Town of Burlington v. *Dep't of Educ.*, 471 U.S. 359 (1985) 3, 17
T.H. ex rel. A.H. v. *Clinton Twp. Bd. of Educ.*, No. 05-3709, 2006 WL 1128713 (D.N.J. Apr. 25, 2006) 13

STATUTES

Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 3
20 U.S.C. § 1400 *et seq.* 1
§ 1401(9) 2
§ 1412(a)(1)(A) 2
§ 1412(a)(6) 5
§ 1412(a)(10) 3, 4, 9, 16, 20
§ 1414 ..... 3, 5
§ 1415(b) 19, 20
§ 1415(i) 3, 9, 20

LEGISLATIVE HISTORY

H.R. Rep. No. 105-95 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78 18
143 Cong. Rec. S4295 (daily ed. May 12, 1997) 18
143 Cong. Rec. H2498 (daily ed. May 13, 1997) 18

TABLE OF AUTHORITIES continued

OTHER AUTHORITIES Page

Thomas A. Mayes & Perry A. Zirkel, *Special Education Tuition Reimbursement Claims: An Empirical Analysis* 22 Remedial & Special Educ. 350 (2001) 14

Mount Bachelor Acad., *College Placement* (2008), *at* http://www.mtba.com/college.html 8

PETITION FOR A WRIT OF CERTIORARI

Forest Grove School District respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 523 F.3d 1078. The court's order denying rehearing and rehearing en banc (Pet. App. 160a) is unpublished. The opinion of the district court (Pet. App. 25a-55a) is unreported. The opinion of the hearing officer of the State of Oregon Office of Administrative Hearings (Pet. App. 56a-159a) is unreported.

JURISDICTION

The court of appeals entered judgment on April 28, 2008. Pet. App. 1a. An order denying rehearing and rehearing en banc was entered on June 5, 2008. *Id.* at 160a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix at Pet. App. 161a-169a.

STATEMENT OF THE CASE

The decision below deepens a preexisting circuit split on an important and recurring question on which this Court granted certiorari in *Board of Education* v. *Tom F. ex rel. Gilbert F.*, 127 S. Ct. 1393 (2007). The question is whether the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400

et seq., permits a tuition reimbursement award against a school district and in favor of parents who unilaterally place their child in private school, where the child had not previously received special education and related services under the authority of a public agency. An equally divided Court was unable to resolve the question. 128 S. Ct. 1 (2007) (per curiam).

In the decision below, a divided Ninth Circuit panel expressly adopted the Second Circuit's view that IDEA permits a tuition reimbursement award under those circumstances. Pet. App. 13a-16a. In so doing, the Ninth Circuit flatly "reject[ed]" the First Circuit's contrary view that the child's prior receipt of special education services from the public agency is a "threshold" requirement for such reimbursement under IDEA. *Id.* at 18a. The need for this Court's review is as great, if not greater, than it was when certiorari was granted in *Tom F.*

I. STATUTORY BACKGROUND.

Enacted pursuant to Congress's spending power, IDEA provides federal funds to assist state and local agencies in educating disabled children, and conditions such funding upon the State's ensuring that a "free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21." 20 U.S.C. § 1412(a)(1)(A); see *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 295 (2006). IDEA defines "free and appropriate public education" ("FAPE") as "special education and related services" that are "provided at public expense," meet state regulatory standards, "include an appropriate ... school ... in the State," and conform to IDEA's statutory and regulatory requirements. *Id.* § 1401(9)(A)-(D). The method for ensuring that

disabled children receive a FAPE is the creation and execution of an "individualized education program" ("IEP"), which is a written statement setting forth the disabled child's special needs and a plan to address those needs, arrived at through evaluations by and meetings among school district and disability professionals and the child's parents. See *Sch. Comm. of Town of Burlington* v. *Dep't of Educ.*, 471 U.S. 359, 368 (1985); 20 U.S.C. § 1414(d)(1), (2).

Prior to 1997, IDEA's text was silent on whether and, if so, under what circumstances state or local agencies had to reimburse parents for placing their children in private school. In *Burlington*, this Court held that IDEA's general grant of authority to district courts to award "appropriate" relief, 20 U.S.C. § 1415(i)(2)(C)(iii) (unless otherwise specified, all citations are to the current version of IDEA), gave courts the equitable discretion to order tuition reimbursement for parents who unilaterally placed their children in private school. 471 U.S. at 369-70.

In 1997, Congress amended IDEA to explicitly address reimbursement for the private school placement of disabled children. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 612(a)(10), 111 Stat. 37, 63-64 (codified at 20 U.S.C. § 1412(a)(10)). IDEA now provides that if the state or local education agency places a disabled child in a private school, the placement is made "at no cost to" the parents. 20 U.S.C. § 1412(a)(10)(B)(i). However, if the parents place their child in a private school without the public agency's consent, the following provision governs:

(ii) Reimbursement for Private School Placement

If the parents of a child with a disability, *who previously received special education and related services under the authority of a public agency*, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

Id. § 1412(a)(10)(C)(ii) (emphasis added). The question that has divided the circuits is whether, in light of these 1997 amendments, IDEA permits tuition reimbursement for parents who unilaterally place in private school a child who previously did not receive special education services from a public agency.

II. FACTUAL AND PROCEDURAL BACKGROUND.

1. Respondent T.A. was enrolled in the Forest Grove School District ("District") from kindergarten until the spring of his junior year in high school. During that period, T.A. never received special education and related services from the District or any other public agency.

T.A. experienced various emotional, behavioral, and educational difficulties while attending Forest Grove High School. Pet. App. 26a-27a, 29a-31a. The District attempted to address T.A.'s poor academic performance through a variety of individualized interventions. Ninth Circuit Supp. Excerpts of

Record at 00001 ("SER"). In December 2000, during his freshman year, T.A. was referred for an evaluation to determine whether he had a learning disability that qualified him for services under IDEA. Pet. App. 26a-27a.

The District formed a multidisciplinary team to conduct the evaluation. Pet. App. 27a; SER 00005. Notes from a January 16, 2001 team meeting questioned, "Maybe ADD [Attention Deficit Disorder] ... /ADHD [Attention Deficit Hyperactivity Disorder]?" Pet. App. 27a (internal quotation marks omitted). But a special education teacher observed that in class T.A. was quiet, worked independently, and behaved appropriately. *Ibid.* And in June 2001, a school psychologist concluded, in determining whether T.A. had a learning disability, that the symptoms listed in the referral did not merit an evaluation for ADHD. *Ibid.*

On June 13, 2001, school officials and T.A.'s mother met to review the results of the evaluations. Pet. App. 27a. Everyone present, including T.A.'s mother, agreed that T.A. did not have a learning disability and was not eligible for special education services. *Ibid.*

During the evaluation process, the District provided T.A.'s parents with notice of their procedural safeguards under IDEA. Pet. App. 28a; see 20 U.S.C. §§ 1412(a)(6), 1414(b)(1). Among other things, the District noted that reimbursement for "private school placement" was available "only if ... the child received special education and related services under the authority of a public agency before enrolling in the private school ... and ... [the] parent provided notice" of the placement. Pet. App. 28a. After the June 2001 determination that T.A. was not eligible for special education services, his parents

never requested another special education evaluation while T.A. was enrolled in the District, and nobody from the high school referred him for such an evaluation. *Ibid.*

2. As T.A. progressed from his freshman to junior years, he exhibited behavioral problems at school and home. Pet. App. 29a. In September 2001, he was suspended for bringing a knife to school. *Ibid.* Starting in early 2002, T.A. began using marijuana. *Id.* at 30a. T.A.'s grades improved during the beginning of his junior year, but by November 2002, he started falling behind and experienced mood swings and angry outbursts. *Ibid.* T.A. began using marijuana with increasing frequency, to the point that he was "so drugged" at times that he "could not get out of bed or speak." *Ibid.*

In January 2003, T.A.'s parents took him to meet Dr. Michael J. Fulop, Psy.D., for an initial diagnostic interview concerning his "odd pattern of behavior." SER 00025 (conducting assessment into T.A.'s "depressive ideation, irritability, impulsiveness, and over-dependence on his family"); see Pet. App. 31a. In addition, T.A.'s father arranged with a high school official for T.A. to apply to finish high school through the "Partnership Program" at Portland Community College ("PCC"). Pet. App. 31a. In the meantime, T.A.'s difficulties persisted. T.A. ran away from home on February 11, 2003. *Id.* at 30a. Upon his return by police several days later, T.A. met with his therapist, Dr. Susan Patchin, Psy.D., whom he had seen since approximately April 2000 for school and anger issues, and underwent testing and evaluation by Dr. Fulop. *Id.* at 31a.

On February 27, 2003, T.A.'s father informed the high school's assistant principal that T.A. was undergoing medical testing, was going to enter a

three-week wilderness training program, and would be attending PCC in the spring. Pet. App. 31a. The next day, T.A.'s father told another high school administrator that T.A. was enrolled at PCC, had completed the necessary placement tests, and had met with an advisor there. *Ibid.* On March 10, 2003, T.A.'s father informed the assistant principal that T.A. was "officially disenrolled" from Forest Grove High School and had registered at PCC. *Id.* at 32a. Neither T.A. nor his parents ever expressed to the assistant principal any dissatisfaction with his placement at PCC, and the assistant principal understood that T.A. was attending PCC as of the beginning of the spring quarter. *Ibid.*

Meanwhile, on March 2, 2003, T.A. had begun a three-week program at Catherine Freer Wilderness Therapy Expeditions ("Freer"). Pet. App. 31a-32a. Freer admitted him because of his "substance abuse and oppositional behavior." *Id.* at 31a; see SER 00056. On March 12, Freer recommended to T.A.'s parents that T.A. be placed in a structured out-of-home facility that could address his drug use and depression. Pet. App. 32a.

On March 14, 2003, Dr. Fulop discussed the results of his evaluation with T.A.'s parents. Pet. App. 32a. He diagnosed T.A. with ADHD (combined subtype) and dysthmic disorder (a form of depression characterized by long-term symptoms, such as sadness). *Ibid.* He found that T.A. had several learning problems and academic limitations, as well as "math disorder and cannabis abuse." *Id.* at 32a-33a. Dr. Fulop specifically recommended that T.A. attend a residential treatment program at Mount Bachelor Academy ("the Academy") because he needed an environment that could address his drug

abuse, school difficulties, ADHD, and depression. *Id.* at 33a.

On March 24, 2003, two days after his discharge from Freer, T.A. enrolled in and immediately began a residential program at the Academy. Pet. App. 33a-34a. The Academy states that it provides a "well-rounded academic and emotional growth curriculum that is designed for children who may have academic, behavioral, emotional, or motivational problems." *Id.* at 34a (internal quotation marks omitted); see also Mount Bachelor Acad., *College Placement* (2008), *at* http://www.mtba.com/college.html (noting that the Academy's students have been accepted at Massachusetts Institute of Technology, Duke University, Bryn Mawr College, George Washington University, and New York University). Monthly tuition at the Academy was $5,200. Pet. App. 34a.

3. Four days after T.A. enrolled in the Academy, his parents hired a lawyer to determine their rights and to notify the District in writing of their actions. Pet. App. 34a. On April 18, 2003, they requested that the District conduct a hearing to evaluate T.A. in all areas of suspected disability. *Ibid.* This was the first time high school officials learned that T.A. was not attending PCC. *Id.* at 35a.

Several District officials evaluated T.A. and reviewed his records. Pet. App. 35a-36a. On July 7, 2003, a multidisciplinary team assembled to review the results and to determine T.A.'s eligibility for services under IDEA. *Id.* at 36a-37a. Present at the meeting were T.A.'s parents, Dr. Patchin, and several officials from the District and the high school. *Ibid.* Everyone in attendance except T.A.'s parents and Dr. Patchin concluded that T.A. did not qualify for special education services. *Id.* at 37a. The team determined that T.A.'s ADHD was permanent, but concluded that

it was not a qualifying disability because it did not adversely impact his educational performance. *Ibid.*

4. T.A. requested a due process hearing, which was held in September and October 2003. Pet. App. 38a. The hearing officer concluded that the District had not shown that T.A. received a FAPE, reasoning that his ADHD adversely impacted his educational performance, thus making him eligible for special education services under IDEA. *Id.* at 38a-39a. Further, the officer ordered the District to reimburse T.A.'s parents for the expense of sending him to the Academy. *Id.* at 39a; see *id.* at 56a-159a.

5. Pursuant to 20 U.S.C. § 1415(i)(2), the District appealed the tuition reimbursement award to the U.S. District Court for the District of Oregon. The district court accepted the hearing officer's factual findings, but held that 20 U.S.C. § 1412(a)(10)(C)(ii) barred the reimbursement award because T.A. had not received special education services from a public agency prior to his unilateral placement in private school. Pet. App. 49a-51a. In this regard, the court found it undisputed that T.A.'s parents agreed with the 2001 ineligibility determination; that they never requested another evaluation; that they removed T.A. from the District for reasons (drug abuse and behavioral problems) unrelated to special education and related services; and that T.A. never received special education services from the District. *Id.* at 51a. Accordingly, the district court concluded that, as a matter of law, T.A. was "not within the category of children eligible for tuition reimbursement." *Ibid.*

6. A divided panel of the Ninth Circuit reversed. T.A. conceded on appeal that he did "not meet the statutory requirements under 20 U.S.C. § 1412(a)(10)(C), because he had not 'previously received special education and related services.'" Pet.

App. 11a. The panel concluded, however, that this did not bar T.A. from receiving private school tuition reimbursement. *Id.* at 2a, 14a-15a. In so holding, the Ninth Circuit expressly adopted the Second Circuit's interpretation of IDEA in *Frank G.* v. *Board of Education*, 459 F.3d 356 (2006), *cert. denied*, 128 S. Ct. 436 (2007).

According to the Ninth Circuit, the text of § 1412(a)(10)(C)(ii) is ambiguous and therefore "does not *clearly* create a categorical bar" to tuition reimbursement where the child did not previously receive special education services from a public agency; the textual canon against interpretations that create absurd results counsels against such a categorical bar; and a categorical bar would be inconsistent with an interpretation from the Department of Education. Pet. App. 14a. The court explained that although "Congress chose to specify in § 1412(a)(10)(C) the requirements and factors to be considered by district courts and hearing officers when deciding whether to award reimbursement to students who previously received special education and related services," "[f]or students who never received" such services, "the new provisions of § 1412(a)(10)(C) simply do not apply." *Id.* at 16a; *id.* at 2a. Rather, students like T.A. who never received special education services "are eligible for reimbursement[] to the same extent as before the 1997 amendments, as 'appropriate' relief pursuant to § 1415(i)(2)(C)." *Id.* at 16a. Echoing the Second Circuit, the Ninth Circuit rejected the First Circuit's contrary decision in *Greenland School District v. Amy N.*, 358 F.3d 150 (1st Cir. 2004). Pet. App. 15a.

Judge Rymer dissented, stating that she did not believe the court "should adopt the reasoning of the Second Circuit." Pet. App. 21a. Judge Rymer

concluded that because a "FAPE w[as] *not* at issue and T.A. was *not* receiving special education and related services before withdrawal from public school," he was not authorized to receive tuition reimbursement under IDEA. *Id.* at 22a.

REASONS FOR GRANTING THE WRIT

In *Tom F.*, this Court granted certiorari on, but was unable to resolve, the question whether IDEA permits a tuition reimbursement award against a school district and in favor of parents who unilaterally place a child in private school, where the child had not previously received special education and related services under the authority of a public agency. This case presents an ideal vehicle to answer that question and to finally resolve the circuit split that has persisted and deepened since this Court heard *Tom F.*

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE RECOGNIZED CIRCUIT SPLIT ON THE QUESTION PRESENTED.

The Ninth Circuit in this case held that despite Congress's enactment of 20 U.S.C. § 1412(a)(10) as part of the 1997 amendments to IDEA, parents who unilaterally place a child in private school may be awarded tuition reimbursement from a state or local education agency even if the child had not previously received special education services from a public agency. Pet. App. 13a-16a. The Ninth Circuit expressly adopted the Second Circuit's ruling in *Frank G.* that 20 U.S.C. § 1415(i)(2)(B), "as construed by the Supreme Court in *Burlington*, provides an ample basis for the award of" reimbursement under those circumstances, and that "[s]ection 1412(a)(10)(C)(ii) does not prohibit it." *Frank G.*, 459

F.3d at 376. The Eleventh Circuit is in accord with the Second and the Ninth. See *M.M. ex rel. C.M.* v. *Sch. Bd.*, 437 F.3d 1085, 1098-99 (2006) (per curiam) (concluding that § 1412(a)(10)(C)(ii) does not categorically bar tuition reimbursement where a child had not attended public school or received special education services).

These decisions directly conflict with *Greenland School District* v. *Amy N.*, 358 F.3d 150 (1st Cir. 2004). In *Greenland*, the child's parents removed her from public school and unilaterally placed her in private school. *Id.* at 153. Only after sending her to a second private school did the parents notify the school district of an alleged need for special education services and seek tuition reimbursement. *Id.* at 154. The First Circuit held that § 1412(a)(10)(C)(ii) imposes as a "threshold requirement[]" to tuition reimbursement that the child "have previously received 'special education and related services' while in the public school system." *Id.* at 159-60 (footnote omitted). The court concluded that the student did not satisfy this requirement because there was "no dispute that neither Katie's parents nor anyone else requested an evaluation for Katie while she was at Greenland," and because she had not received such services from the school. *Id.* at 160. See also *Lauren W. ex rel. Jean W.* v. *Deflaminis*, 480 F.3d 259, 276 n.21 (3d Cir. 2007) (suggesting, in dicta, that the plain language of § 1412(a)(10)(C)(ii) may confine tuition reimbursement to parents with children who previously received special education services under IDEA).

The grounds for certiorari are stronger now than they were when this Court heard *Tom F.* Not only has the circuit conflict deepened, but the decision below creates a particularly stark split with the First

Circuit's decision in *Greenland*. In both cases, before placing their child in private school, the parents failed to notify the school district of any issue regarding their child's alleged need for special education or that their child was being removed for special education purposes. See Pet. App. 51a, 53a; *Greenland*, 358 F.3d at 160. Yet the courts reached diametrically opposed conclusions as to whether reimbursement was available under those circumstances.

Mirroring the circuit conflict, district courts outside the First, Second, Ninth, and Eleventh Circuits have divided over the question presented here. Some district courts have adopted the First Circuit's rule. See *T.H. ex rel. A.H.* v. *Clinton Twp. Bd. of Educ.*, No. 05-3709, 2006 WL 1128713, at *6 (D.N.J. Apr. 25, 2006) (holding that § 1412(a)(10)(C)(ii) "require[s] a student to have received special education and related services as a prerequisite" to private school tuition reimbursement); *Lunn* v. *Weast*, No. 05-2363, 2006 WL 1554895, at *6 (D. Md. May 31, 2006) (relying on *Greenland* to conclude that "reimbursement is barred where a student has not previously received public special education and related services"); *Balt. City Bd. of Sch. Comm'rs* v. *Taylorch*, 395 F. Supp. 2d 246, 249 (D. Md. 2005).

Other district courts, both before and after this Court heard *Tom F.*, have adopted the rule prevailing in the Second, Ninth, and Eleventh Circuits. See *J.S. ex rel. R.S.* v. *S. Orange/Maplewood Bd. of Educ.*, No. 06-3494 (FSH), 2008 WL 820181, at *6 (D.N.J. Mar. 26, 2008) (holding that § 1412(a)(10)(C)(ii) "does not preclude tuition reimbursement in cases where the child is unilaterally placed in a private institution before the child receives special education," and finding "[t]he reasoning of *Frank G.* applies to the

case at bar"); *D.L. ex rel. J.L.* v. *Springfield Bd. of Educ.*, 536 F. Supp. 2d 534, 541-42 (D.N.J. 2008) (adopting *Frank G.* and rejecting view that reimbursement "is only available to parents whose child had previously received special education and related services from a public agency"); *Justin G. ex rel. Gene R.* v. *Bd. of Educ.*, 148 F. Supp. 2d 576, 587 (D. Md. 2001) (holding that § 1412(a)(10)(C)(ii) is no bar to reimbursement for children who have not received IDEA services).

As commentators have noted, lawsuits seeking "reimbursement for private school tuition [are] one of the most controversial aspects of special education law," Thomas A. Mayes & Perry A. Zirkel, *Special Education Tuition Reimbursement Claims: An Empirical Analysis*, 22 Remedial & Special Educ. 350, 350 (2001), and the volume of such litigation has increased "steadily and steeply" over the last twenty years. *Id.* at 355. Moreover, school districts are becoming "increasingly financially strained by ... the increased frequency of tuition reimbursement" lawsuits. *Id.* at 357; see also *id.* at 350 (recognizing that "typical tuition reimbursement disputes" involve "high financial stakes," particularly where, as here, residential program tuition is implicated). Given the circuit conflict and its practical consequences, the Court should grant review to provide uniformity on this important and recurring issue.

II. THE NINTH CIRCUIT'S DECISION MISINTERPRETS IDEA AND CONFLICTS WITH THIS COURT'S SPENDING CLAUSE JURISPRUDENCE.

The Ninth Circuit's decision cannot be reconciled with this Court's Spending Clause jurisprudence. In *Arlington Central School District*, the Court made clear that interpretation of IDEA is "guided by the

fact that Congress enacted the IDEA pursuant to the Spending Clause." 548 U.S. at 295. Thus, in resolving the question presented here, it is necessary to "view the IDEA from the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds," and to "ask whether such a state official would clearly understand that one of the obligations of the Act is the obligation to compensate prevailing parents" for private school tuition even where their child previously had not received special education services from a public agency. *Id.* at 296.

The decision below turns the Spending Clause on its head. In allowing private school tuition reimbursement, the Ninth Circuit reasoned "that § 1412(a)(10)(C)(ii) is ambiguous because its text dose not *clearly* create a categorical bar" to reimbursement where the child had not previously received special education services from a public agency. Pet. App. 14a (citing *Frank G.*, 459 F.3d at 368-70). But the question under the Spending Clause is not whether the statute clearly *relieves* the State of an obligation; rather, it is whether the statute clearly *imposes* the obligation. Thus, even if (as the Ninth Circuit held) § 1412(a)(10)(C)(ii) were ambiguous, the Spending Clause would require that the ambiguity be resolved in favor of the State, for an ambiguous statute, by definition, cannot provide the "clear notice" demanded by the Spending Clause.

Properly viewed through the lens of the Spending Clause, and given the enactment of § 1412(a)(10) in 1997, IDEA does not permit tuition reimbursement where, as here, parents unilaterally place in private school a child who previously did not receive special education service from a public agency. Section 1412(a)(10) comprehensively addresses private school

placement. Section 1412(a)(10)(B) provides that disabled children in private schools will receive special education and related services, "at no cost to their parents," where the children are placed in, or referred to, the school by the state or local school agency. 20 U.S.C. § 1412(a)(10)(B)(i). However, if the parents unilaterally place their child in a private school without the agency's consent or referral, reimbursement is limited as follows:

> (ii) Reimbursement for Private School Placement
>
> If the parents of a child with a disability, *who previously received special education and related services under the authority of a public agency*, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

Id. § 1412(a)(10)(C)(ii) (emphasis added).

The only notice Congress provided state officials concerning tuition reimbursement for unilateral private school placement is that the State may be required to provide reimbursement, if FAPE was not made available, where the child "previously received special education and related services under the authority of a public agency." The statutory text does not provide any notice, let alone clear notice, of any obligation to provide reimbursement where the child did not previously receive special education services from a public agency.

This Court's 1985 decision in *Burlington* does not provide an adequate substitute for the lack of clear notice in the statutory text. *Burlington* interpreted a prior version of the general "appropriate" relief provision in 20 U.S.C. § 1415(i)(2)(C)(iii) to allow courts the discretion to grant tuition reimbursement to parents who unilaterally placed their children in private school. 471 U.S. at 369-70. At the time, however, IDEA was silent on subject of tuition reimbursement. Indeed, the Court expressly noted that it interpreted the general "appropriate" relief provision "[a]bsent other reference" in the statute to what would be "appropriate" under the circumstances. *Id.* at 369.

The 1997 amendments to IDEA provided the "other reference" that was missing when the Court decided *Burlington*. As noted above, the amendments specifically and comprehensively address the subject of private school placement and, in particular, tuition reimbursement. It is a fundamental tenet that "a specific statute" like § 1412(a)(10)(C) "will not be controlled or nullified by a general one" like § 1415(i)(2)(C)(iii), "regardless of the priority of enactment." *Morton* v. *Mancari*, 417 U.S. 535, 550-51 (1974). This "canon [is] particularly pertinent" where, as here, the general provision "is a relic" of a prior "regime." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992). Consequently, with respect to reimbursement for private school tuition, § 1412(a)(10)(C) trumps the general "appropriate" relief provision upon which *Burlington* relied.

The legislative history of the 1997 amendments, insofar as it is relevant, confirms this reading of the statute. The House Committee Report states that the private school provisions "specif[y] that parents may be reimbursed for the cost of a private educational

placement under certain conditions .... *Previously, the child must have had [sic] received special education and related services under the authority of a public agency.*" H.R. Rep. No. 105-95, at 93 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 90 (emphasis added). A proponent of the amendments explained on the floor that "[t]his bill makes it harder for parents to unilaterally place a child in elite private schools at public taxpayer expense, lowering costs to local school districts." 143 Cong. Rec. H2498, H2536 (daily ed. May 13, 1997) (statement of Rep. Castle). Another proponent stated, "Should educators have an opportunity to offer a free appropriate public education to a child with a disability, before the child's parents place the child in a private school and send the school district the bill? ... [The amendment] dictates that the answer be yes, but so does common sense." 143 Cong. Rec. S4295, S4296 (daily ed. May 12, 1997) (statement of Sen. Jeffords).

Against all this, the Ninth Circuit cited a 1999 interpretation offered by the Department of Education, not in a regulation, but in commentary accompanying regulations. Pet. App. 14a & n.9 (citing 64 Fed. Reg. 12,406-01, 12,602 (Mar. 12, 1999)). That agency interpretation, issued years before this Court made clear in *Arlington* that IDEA is a Spending Clause statute, cannot overcome the lack of clear notice in the statutory text, for it is Congress that must supply clear notice of any obligations placed on States. See *Arlington*, 548 U.S. at 303; *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). Moreover, for agency interpretations to carry any weight, the statute must be ambiguous. See *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999, 1009 (2008) (noting that *Skidmore* deference would apply if statute were ambiguous, but not if the

statute is clear); *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). But if the statute is ambiguous, it cannot provide the clear notice required by the Spending Clause.

The Ninth Circuit also claimed that interpreting § 1412(a)(10)(C) to prohibit reimbursement where the child had not yet received special education services from the public agency would run contrary to IDEA's goal "'to ensure that *all* children with disabilities have available to them'" a FAPE. Pet. App. 15a (quoting 20 U.S.C. § 1400(d)(1)(A)). But as this Court explained in *Arlington*, IDEA "obviously does not seek to promote th[is] goal[] at the expense of all other considerations, including fiscal considerations.... [It] is not intended in all instances to further the broad goals ... at the expense of fiscal considerations." 548 U.S. at 303. Indeed, the legislative history of the 1997 amendments confirms that Congress specifically intended to make tuition reimbursement more difficult, a goal that must be balanced with IDEA's other goals and that is embodied in § 1412(a)(10)(C). See *supra* at 17-18.

Finally, the Ninth Circuit reasoned that if tuition reimbursement were not available here, an absurdity would arise because "if the school district declined to recognize a student as disabled as occurred in this case the student would *never* receive special education in public school and therefore would *never* be eligible for reimbursement." Pet. App. 16a. The Ninth Circuit's argument misreads IDEA. Congress provided parents with numerous procedural avenues, all with tight deadlines for action, to challenge adverse disability determinations and obtain independent review. See, *e.g.*, 20 U.S.C. § 1415(b)(1) (right to seek independent educational evaluation); *id.* § 1415(b)(7) (right to a due process hearing); *id.*

§ 1415(b)(5) (mediation); *id.* § 1415(i)(2) (court review). These provisions obviate any concern that a child may "never receive special education" services if the local education agency makes an initial finding that the child is not disabled.

Indeed, it is the Ninth Circuit's reading of the 1997 amendments that creates the greatest potential for absurdity. Congress amended IDEA to address comprehensively the States' obligations to disabled children placed in private schools and to limit their obligation to provide tuition reimbursement where the placement is unilateral. See 20 U.S.C. § 1412(a)(10)(C). Yet the Ninth Circuit concluded that these new provisions "simply do not apply" to "students who never received special education and related services." Pet. App. 16a; compare *Frank G.*, 459 F.3d at 376 (suggesting that other requirements of § 1412(a)(10)(C) still applied to the parents of students who previously had not received special education services from a public agency). In the Ninth Circuit, then, parents who never place their child in public school are more likely to receive tuition reimbursement than parents who do. That cannot possibly be what Congress had in mind when enacting the 1997 amendments.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

EAMON P. JOYCE
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300

GARY FEINERMAN*
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

RYAN C. MORRIS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

RICHARD COHN-LEE
ANDREA L. HUNGERFORD
THE HUNGERFORD LAW FIRM, LLP
P.O. Box 3010
Oregon City, OR 97045
(503) 650-7990

Counsel for Petitioner

September 3, 2008

*Counsel of Record

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 05-35641

FOREST GROVE SCHOOL DISTRICT,
Plaintiff-Appellee,
v.
T.A.,
Defendant-Appellant.

Argued and Submitted March 11, 2008
Filed April 28, 2008

Appeal from the United States District Court for the District of Oregon; Michael W. Mosman, *District Judge*, Presiding. D.C. No. CV-04-00331-MO

Before: PAMELA ANN RYMER, SUSAN P. GRABER, and CARLOS T. BEA, *Circuit Judges*.

Opinion by *Judge* GRABER; Dissent by *Judge* RYMER.

GRABER, *Circuit Judge*:

Defendant T.A., a former student of Plaintiff Forest Grove School District, appeals the district court's denial of reimbursement under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1482, for his expenses in attending a private school. We must decide whether a student who never

received special education and related services from a school district nevertheless may recover reimbursement for the costs of private school education. We conclude that such a student is not barred as a matter of law from receiving reimbursement. In the IDEA, Congress conferred broad discretion on the courts to provide appropriate equitable relief, including reimbursement for attendance at a private school. Later amendments clarifying the relevant considerations for those students who previously received special education and related services do not apply to students, like T.A., who never received special education and related services. Because the district court applied an improper legal framework to T.A.'s claim for reimbursement under general principles of equity, we reverse and remand for reconsideration.

FACTUAL AND PROCEDURAL HISTORY

T.A. was born on September 11, 1985. He resided at all relevant times in the Forest Grove School District. T.A. was enrolled in the School District from kindergarten until the spring semester of his junior year in high school, when his parents removed him from public school and enrolled him in a residential private school. Throughout his time in public school, T.A. experienced difficulty paying attention in class and completing his school work, but he successfully passed from grade to grade due, in part, to extensive at-home help from his parents and sister. T.A. never received special education and related services from the School District.

During his time in public school, the School District evaluated T.A. for a disability only once, in 2001. In December 2000, T.A.'s guidance counselor suspected that T.A. might have a learning disability and referred him for an evaluation for special education

services. In internal meetings in early 2001, the School District's staff discussed the possibility that T.A. might have Attention Deficit Hyperactivity Disorder ("ADHD"). The notes from a January 16, 2001, meeting state "Maybe ADD/ADHD?" and the notes from a February 13, 2001, meeting mention "suspected ADHD." T.A.'s parents were neither present at the meetings nor informed of the School District staff's suspicion that T.A. might have ADHD. T.A.'s parents did not request evaluation for ADHD, and T.A. was evaluated only for a learning disability.[1]

Several psychologists and educational specialists examined T.A. and administered tests throughout the first half of 2001. On June 13, 2001, the team of specialists unanimously concluded that T.A. did not have a learning disability and therefore was ineligible for special education. T.A.'s mother, who attended the meeting, agreed with that determination. The school psychologist completed his report in September 2001, stating that T.A. was not eligible for special education under the IDEA on the basis of a learning disability, but "[p]ossible 504."[2] No one ever followed up on either the reference to "[p]ossible 504" in the psychologist's report or the references to "suspected ADHD" in the School District's staff meeting notes.

[1] ADHD is classified as a mental disorder. A person with ADHD often has symptoms similar to those experienced by a person with a learning disability, but ADHD is a disorder distinct from learning disabilities. *See generally* Nat'l Inst. of Mental Health, Attention Deficit Hyperactivity Disorder (2006), *available at* http:// www. nimh. nih. gov/ publicat/ adhd. cfm. The evaluation of T.A. for a learning disability therefore did not encompass an evaluation for ADHD.

[2] Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), gives certain rights to students with disabilities. This appeal concerns only the IDEA.

At some point during 2002, T.A. began using marijuana. In early 2003, his use became regular, and he exhibited noticeable personality changes. On February 11, 2003, T.A. ran away from home. The police brought him back a few days later. T.A.'s parents took him to a psychologist and, eventually, to a hospital emergency room.

Dr. Fulop, a psychologist hired by T.A.'s parents, met with T.A. a number of times in early 2003. Dr. Fulop held several lengthy sessions immediately after T.A. ran away from home. On March 15, 2003, Dr. Fulop diagnosed T.A. with ADHD, depression, math disorder, and cannabis abuse. Dr. Fulop recommended a residential program for T.A. because of T.A.'s failure to live up to his potential in school, his difficulties at home, his attitude toward school, his sense of hopelessness, and his drug problem.

In response to T.A.'s behavior, T.A.'s parents removed him from the School District's public high school and, in March 2003, sent him to a three-week program at Catherine Freer Wilderness Therapy Expeditions. The discharge report written by Freer's staff identified T.A.'s primary diagnosis as cannabis dependence and his secondary diagnosis as depression.

Soon after T.A. completed the Freer Expedition, on March 24, 2003, his parents enrolled him in Mount Bachelor Academy, a residential private school that describes itself as "designed for children who may have academic, behavioral, emotional, or motivational problems." Although T.A. committed a number of serious rule violations at Mount Bachelor Academy, he graduated in June 2004. He also would have graduated from public high school in 2004 had he remained there.

On March 28, 2003, four days after enrolling T.A. at Mount Bachelor Academy, T.A.'s parents hired a lawyer. On April 18, 2003, they requested a hearing pursuant to 20 U.S.C. § 1415(f) and sought (among other remedies) an order requiring the School District to evaluate T.A. in all areas of suspected disability. The Office of Administrative Hearings for the State of Oregon initiated a hearing in May 2003, but the assigned hearing officer continued the matter to allow the School District to evaluate T.A.

During the summer months of 2003, several medical and educational specialists from the School District evaluated T.A. On July 7, 2003, a multidisciplinary team of school officials convened to determine T.A.'s eligibility under the IDEA. The team acknowledged T.A.'s learning difficulties, his diagnosis of ADHD, and his depression, but a majority found that T.A. did not qualify under the IDEA in the areas of learning disability, ADHD, or depression, because those diagnoses did not have a severe effect on T.A.'s educational performance. On August 26, 2003, a similar team convened and determined that T.A. was ineligible for services or accommodations under § 504 of the Rehabilitation Act of 1973.

The administrative hearing then resumed in September 2003. Both parties submitted evidence. The evidence included the extensive history recounted above. In addition, another psychologist, Dr. Callum, examined T.A.'s records and testified at the hearing that T.A.'s ADHD "seems to be more of a secondary, possibly, tertiary" cause of his difficulties. She concluded that T.A. would be able to complete public high school without any services beyond those given to all students. She did state, however, that the references to the possibility of ADHD in the meeting

notes following the 2001 referral would have caused her to evaluate T.A. for ADHD.

On January 26, 2004, the Hearing Officer issued a lengthy opinion that contained extensive findings of fact and conclusions of law. She held that T.A. was disabled and therefore eligible for special education under the IDEA and § 504 of the Rehabilitation Act of 1973; that the School District had failed to offer T.A. a free appropriate public education; that the School District was not responsible for the costs of the Freer Expedition or the evaluation by Dr. Fulop; but that the School District was responsible for the costs of sending T.A. to Mount Bachelor Academy. Monthly tuition at Mount Bachelor Academy was $5,200.

The School District appealed to the district court pursuant to 20 U.S.C. § 1415(i), arguing that the Hearing Officer erred by granting reimbursement for T.A.'s tuition at Mount Bachelor Academy.[3] According to the School District, reimbursement was unwarranted because T.A. unilaterally withdrew from public school without providing prior notice to the School District, he never received special education and related services from the School District, and he withdrew for reasons unrelated to his disability (that is, substance abuse and behavioral problems).

The district court reversed the Hearing Officer's grant of reimbursement to T.A. The court adopted all of the Hearing Officer's findings of fact, but held that the Hearing Officer had erred as a matter of law in granting private school reimbursement. The district court held that T.A. was statutorily ineligible for

[3] T.A. did not cross-appeal the denial of reimbursement for the costs of the Freer Expedition or the evaluation by Dr. Fulop.

reimbursement under 20 U.S.C. § 1412(a)(10)(C). The court also held that, "[e]ven assuming that tuition reimbursement may be ordered . . . , under general principles of equity . . . , the facts in this case do not support such an exercise of equity."

T.A. timely appealed to this court. This case was originally scheduled for oral argument on May 9, 2007. On May 3, we granted the parties' joint motion to waive oral argument and, at the same time, ordered supplemental briefing. On August 8, we referred the case to mediation and deferred submission pending the Supreme Court's decision in *Frank G. v. Board of Education*, 459 F.3d 356 (2d Cir.2006), *petition for cert. filed*, 75 U.S.L.W. 3248 (U.S. Oct. 23, 2006) (No. 06-580), *cert. denied*, U.S. , 128 S.Ct. 436, 169 L.Ed.2d 325 (2007). On September 18, we granted the parties' joint motion to defer mediation until after the Supreme Court's resolution of a different Second Circuit case addressing the same issue. *See Bd. of Educ. v. Tom F.*, 2005 WL 22866 (S.D.N.Y.2005) (unpublished decision), *vacated*, 193 Fed.Appx. 26 (2d Cir.2006) (unpublished decision) (summarily reversing the district court's decision and remanding in light of *Frank G.*), *cert. granted*, U.S. , 127 S.Ct. 1393, 167 L.Ed.2d 158 (2007), *aff'd*, U.S. , 128 S.Ct. 1, 169 L.Ed.2d 1 (2007) (per curiam).

On October 10, 2007, the Supreme Court affirmed without opinion the Second Circuit's decision in *Tom F.* by an equally divided Court. 128 S.Ct. at 1. Justice Kennedy took no part in the decision of the case. *Id.* at 2. The next week, the Supreme Court denied certiorari in *Frank G.*, 128 S.Ct. at 436, again with Justice Kennedy taking no part in the decision. Thereafter, the parties informed us that they were

unable to reach agreement through mediation, and we subsequently heard oral argument and submitted the case.

STANDARDS OF REVIEW

We review de novo questions of law. *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1310 (9th Cir.1987). We therefore review de novo the legal question whether 20 U.S.C. § 1412(a)(10)(C) creates a categorical bar to reimbursement of private school tuition for students who have not "previously received special education and related services."

We review the district court's factual findings for clear error. *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 891 (9th Cir.1995).

We review for abuse of discretion the district court's determination under principles of equity to grant or deny reimbursement for private school tuition. The text of the IDEA makes clear that the district court exercises its discretion in fashioning appropriate relief:

> In any action brought under this paragraph, *the court*
>
> (i) shall receive the records of the administrative proceedings;
>
> (ii) shall hear additional evidence at the request of a party; and
>
> (iii) basing its decision on the preponderance of the evidence, *shall grant such relief as the court determines is appropriate.*

20 U.S.C. § 1415(i)(2)(C) (emphases added).[4] The Supreme Court has interpreted the emphasized pro-

[4] Because the parties in this case did not present any new evidence before the district court or request a further hearing,

vision as conferring "broad discretion on the court." *See Sch. Comm. of Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985) ("The statute directs the court to 'grant such relief as [it] determines is appropriate.' The ordinary meaning of these words confers broad discretion on the court." (alteration in original)); *see also Burlington v. Dep't of Educ.*, 736 F.2d 773, 801 (1st Cir.1984) (holding that reimbursement is "a matter of equitable relief, committed to the sound discretion of the district court"), *aff'd*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385. In *Florence County School District Four v. Carter ex rel. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993), the Court summarized:

> [O]nce a court holds that the public placement violated IDEA, it is authorized to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415[(i)(2)(C)]. Under this provision, equitable considerations are relevant in fashioning relief, and the court enjoys broad discretion in so doing. Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors. . . .

Id. at 15-16, 114 S.Ct. 361 (some citations and internal quotation marks omitted).[5]

This court therefore has applied an abuse of discretion standard when reviewing a district court's

the district court's decision rested entirely on the administrative record.

[5] Congress has amended the IDEA several times such that the lettering, but not the substance, of the subsections has changed. Throughout this opinion, we alter the identifiers to reflect the present-day version of the IDEA.

grant or denial of equitable relief. *See Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1496 (9th Cir.1994) ("The district court exercised its discretion in denying this equitable remedy, and this court reviews for abuse of that discretion."); *see also Park ex rel. Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1033 (9th Cir.2006) (per curiam) ("We review the Hearing Officer's and the district court's award of compensatory education services for abuse of discretion." (citing *Parents of Student W.*, 31 F.3d at 1496)). Although we have not been entirely consistent in applying a standard of review to the district court's grant or denial of an equitable remedy,[6] no case supports T.A.'s contention that we review *the hearing officer's decision* for abuse of discretion.[7] In

[6] In several cases, we reviewed de novo the issue of reimbursement, making an independent determination while giving appropriate deference to the hearing officer's findings. *See, e.g., Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1479 (9th Cir.1993); *Ash v. Lake Oswego Sch. Dist., No. 7J*, 980 F.2d 585, 589 (9th Cir.1992); *W.G. v. Bd. of Trs. of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1486 (9th Cir.1992), *superseded by statute on other grounds as recognized in R.B. ex rel. F.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 938-39 (9th Cir.2007). In other cases, we did not articulate any standard at all, granting reimbursement automatically after determining that the school district failed to provide a free appropriate public education and that the student was placed in an appropriate private school. *See, e.g., Capistrano*, 59 F.3d at 896-97; *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1527 (9th Cir.1994). It appears that, in these latter cases, the school district did not argue that equitable considerations weighed against reimbursement, so we had no reason to address the question.

[7] The hearing officer and the district court in *Park* reached the same conclusion, so we did not have to distinguish between the two conclusions. The citation to *Parents of Student W.* suggests that we review for abuse of discretion the *district court's decision* only.

any event, to the extent that our cases are unclear, we reaffirm that the text of the statute and Supreme Court precedent dictate that we review for abuse of discretion the district court's determination of appropriate equitable relief. "A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States,* 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996).

DISCUSSION

The IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education." 20 U.S.C. § 1400(d)(1)(A). The Hearing Officer in this case held that T.A. qualified as disabled under the IDEA and that the School District had failed to offer him a free appropriate public education. Those issues are not before us on appeal.[8] Instead, we must determine the availability, if any, of private school reimbursement for a student, like T.A., who never received special education and related services from a school district.

T.A. concedes that, as the district court held, he does not meet the statutory requirements under 20 U.S.C. § 1412(a)(10)(C), because he had not "previously received special education and related services." He argues that reimbursement is nevertheless available as a remedy under general principles of equity pursuant to 20 U.S.C. § 1415(i)(2)(C). T.A. further argues that the district court erred in its

[8] The School District argued before the district court that the Hearing Officer erred as a matter of law by holding that T.A. was disabled for purposes of the IDEA, but the district court did not reach the issue. Because the School District did not renew its argument before this court, we also do not address this question.

analysis under general principles of equity. We will address each of those two arguments in turn.

A. *Private School Reimbursement Under 20 U.S.C. § 1412(a)(10)(C)*

Before 1997, the IDEA was silent on the subject of private school reimbursement, but courts had granted such reimbursement as "appropriate" relief under principles of equity pursuant to 20 U.S.C. § 1415(i)(2)(C). *See Burlington*, 471 U.S. at 370, 105 S.Ct. 1996 ("[W]e are confident that by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case."); 20 U.S.C. § 1415(i)(2)(C) ("In any action brought under this paragraph, the court . . . shall grant such relief as the court determines is appropriate."). Congress amended the IDEA in 1997 to include a new section entitled "Payment for education of children enrolled in private schools without consent of or referral by the public agency." 20 U.S.C. § 1412(a)(10)(C). Clause (ii) of the new statutory section states:

> If the parents of a child with a disability, *who previously received special education and related services* under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

20 U.S.C. § 1412(a)(10)(C)(ii) (emphasis added). Clause (iii) further states that "[t]he cost of reimbursement

described in clause (ii) may be reduced or denied" if certain requirements, such as notice, are not met. *Id.* § 1412(a)(10)(C)(iii); *see also id.* § 1412(a)(10)(C)(iv) (stating exceptions to the requirements in clause (iii)).

In this case, the Hearing Officer and district court found, and neither party challenges, that T.A. never received special education and related services from a public agency. Accordingly, we must decide whether the reference in § 1412(a)(10)(C) to students "who previously received special education and related services" bars private school reimbursement for students who have not "previously received special education and related services," or whether those students remain eligible for private school reimbursement, as they were before 1997, under principles of equity pursuant to § 1415(i)(2)(C). In other words, did Congress revoke, categorically, private school reimbursement for students who have never received special education and related services from a public agency, or did Congress simply legislate concerning students who had previously received special education and related services, leaving discretion in cases such as T.A.'s in the hands of courts applying principles of equity?

We are not the first circuit court to have addressed this question. In *Frank G.*, 459 F.3d at 367-76, the Second Circuit thoroughly analyzed the question and concluded that the reference in 20 U.S.C. § 1412(a)(10)(C)(ii) to students "who previously received special education and related services" does not create a categorical bar to recovery of private school reimbursement for all other students. We agree with and adopt the analysis and conclusion of the Second Circuit.

The Second Circuit first examined the text of the statute. The court concluded that § 1412(a)(10)(C)(ii) is ambiguous because its text does not *clearly* create a categorical bar and because such an interpretation is in tension with the broader context of the statute. *Id.* at 368-70. The Second Circuit then applied "traditional canons of statutory construction" to the ambiguous text and reasoned that reading § 1412(a)(10)(C)(ii) to create a categorical bar "would defeat both purposes of the IDEA," which are to give children with disabilities an *appropriate* and *free* education; would not "produce[ ] a substantive effect that is compatible with the rest of the law"; and would lead to "absurd results." *Id.* at 370-72 (internal quotation marks omitted). Finally, the Second Circuit noted that its interpretation was "consistent with that of the [U.S.] Department of Education's Office of Special Education & Rehabilitative Services," *id.* at 372-73,[9] and held that neither the ambiguous

[9] The Second Circuit quotes a letter by the U.S. Department of Education establishing its position that § 1412(a)(10)(C) does not "foreclos[e] categorically an award of reimbursement in a case in which a child has not yet been enrolled in special education and related services." *Frank G.*, 459 F.3d at 373 (quoting Letter to Susan Luger, *listed in* 65 Fed.Reg. 9178 (Feb. 23, 2000), and *reprinted in* 33 I.D.E.L.R. 126 (Mar. 19, 1999)). We note that the Department of Education's position was also set forth in the Federal Register in response to comments concerning its regulations governing the IDEA:

> [H]earing officers and courts retain their authority, recognized in *Burlington* and *Florence*... to award "appropriate" relief if a public agency has failed to provide FAPE [free appropriate public education], including reimbursement and compensatory services, under section [1415(i)(2)(C)(iii)] in instances in which the child has not yet received special education and related services. This authority is independent of their authority under section [1412](a)(10)(C)(ii)

legislative history of § 1412(a)(10)(C)(ii) nor the First Circuit's decision in *Greenland School District v. Amy N.*, 358 F.3d 150 (1st Cir.2004), altered its conclusion. *Frank G.*, 459 F.3d at 373-76.

We see no reason to disagree with the Second Circuit's well-reasoned analysis of this issue. We emphasize in particular that the express purpose of the IDEA is "to ensure that *all* children with disabilities have available to them a free appropriate public education." 20 U.S.C. § 1400(d)(1)(A) (emphasis added); *see also Burlington,* 471 U.S. at 369-70, 105 S.Ct. 1996 (emphasizing this purpose).[10] Interpreting the 1997 amendments to prohibit categorically reimbursement to students who have not yet received special education and related services runs contrary to this express purpose. Additionally, it would lead to the absurd result that the parents of a child with a disability must wait (an indefinite, perhaps lengthy period) until the child has received special education in public school before sending the child to an appropriate private school, no matter how uncooperative the school district and no matter how inappropriate

> to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency.

64 Fed.Reg. 12,406-01, 12,602 (Mar. 12, 1999).

[10] The dissent asserts that a "FAPE was not at issue" when T.A.'s parents removed him from public school. Dissent at 1090. But the Hearing Officer found that T.A. was disabled and that the School District failed to provide a FAPE. The district court adopted all of the Hearing Officer's factual findings, and the School District has not appealed any of those findings. T.A.'s parents also provided notice to the School District before T.A.'s final year of school. On this record, therefore, we must take as a given that T.A. was disabled and that the School District failed to provide a FAPE.

the special education. Further, if the school district declined to recognize a student as disabled as occurred in this case the student would *never* receive special education in public school and therefore would *never* be eligible for reimbursement under § 1412(a)(10)(C)(ii). "The Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives." *Burlington,* 471 U.S. at 372, 105 S.Ct. 1996.

In amending the IDEA in 1997, Congress chose to specify in § 1412(a)(10)(C) the requirements and factors to be considered by district courts and hearing officers when deciding whether to award reimbursement to students who previously received special education and related services. For students who never received special education and related services, however, the new provisions of § 1412(a)(10)(C) simply do not apply. For those students, reimbursement may be sought only under principles of equity pursuant to § 1415(i)(2)(C). Because T.A. never received special education and related services, § 1412(a)(10)(C) does not apply in this case.[11] He may recover reimbursement, if at all, only under principles of equity pursuant to § 1415(i)(2)(C).

In conclusion, we hold that students who have not "previously received special education and related services" are eligible for reimbursement, to the same extent as before the 1997 amendments, as "appropriate" relief pursuant to § 1415(i)(2)(C).[12] The statutory

[11] Therefore, we express no opinion on the requirements for reimbursement under § 1412(a)(10)(C) for students who have received special education and related services.

[12] Given our clear statement that such students are eligible "to the same extent as before the 1997 amendments," we are

requirements of § 1412(a)(10)(C) do not apply. We therefore reverse the district court's holding that T.A.'s failure to meet the requirements of § 1412(a)(10)(C) prevents private school reimbursement as a matter of law, and turn to the district court's alternative holding that T.A. was not entitled to reimbursement under general principles of equity.

B. *Private School Reimbursement Under Principles of Equity Pursuant to 20 U.S.C. § 1415(i)(2)(C)*

"Parents have an equitable right to reimbursement for the cost of providing an appropriate education when a school district has failed to offer a child a [free appropriate public education]. The conduct of both parties must be reviewed to determine whether relief is appropriate." *W.G.*, 960 F.2d at 1485-86 (citation omitted). The district court exercises its discretion in granting or denying appropriate equitable relief under § 1415(i)(2)(C), and we may reverse only if the district court has abused that discretion. We hold that the district court in this case abused its discretion in denying private school reimbursement to T.A., because the district court made two distinct legal errors in its discussion of the relevant equitable considerations. We therefore reverse the district court's denial of private school reimbursement and remand for consideration of T.A.'s claim under the proper legal framework.

First, the district court erred by considering the § 1412(a)(10)(C) statutory requirements in its analysis under principles of equity. In particular, the district court found that the equitable considerations

puzzled by the dissent's unsupported assertion that our opinion "*expand[s]* the principle" of equitable reimbursement. Dissent at 4557.

in favor of granting reimbursement did not "override the statutory requirements for tuition reimbursement." As discussed above, there are no statutory requirements for tuition reimbursement for students, like T.A., who never received special education and related services in public school. Congress' choice to legislate concerning students who previously received special education and related services did not alter the proper analysis for students who have not received special education and related services in public school, under general principles of equity pursuant to § 1415(i)(2)(C).

Second, the district court applied the wrong legal standard by asserting that "tuition reimbursement may be ordered in an *extreme case* for a student not receiving special education services." (Emphasis added.) The court cited *Greenland,* 358 F.3d at 160 n. 8, for that proposition, not having the benefit of our opinion today, which rejects *Greenland* in favor of the Second Circuit's approach. Nothing in § 1415(i)(2)(C), Supreme Court precedent, or our own precedent suggests that tuition reimbursement is available only in *extreme cases* for parents who place their child in private school before receiving special education and related services in public school.

In summary, the district court erroneously considered the inapplicable statutory requirements of § 1412(a)(10)(C) and applied an incorrect legal standard. We therefore reverse the district court's denial of reimbursement and remand for reconsideration consistent with this opinion. On remand, the district court should consider all relevant factors in determining whether to grant reimbursement and the amount of the reimbursement, including those factors that we have identified in the past. For

example, we have previously recognized that notice to the school district is a relevant equitable consideration. In *Ash,* the disabled student attended private school beginning in 1983, but his parents did not provide meaningful notice to the school district until 1989. *Ash v. Lake Oswego Sch. Dist. No. 7J,* 766 F.Supp. 852, 853-55, 864 (D.Or.1991); *see also Ash,* 980 F.2d at 586 (incorporating the district court's account of the facts). In response to the parents' 1989 request, the school district offered to provide certain special education services, *Ash,* 766 F.Supp. at 855, but the district court found that the offered services were inadequate to meet the student's educational needs, *id.* at 863. The district court awarded reimbursement beginning in 1989, but rejected the parents' claim that private school reimbursement should be given for the whole period beginning in 1983. *Id.* at 864. We affirmed the district court's conclusion that reimbursement was warranted only beginning in 1989, after "'[the school district] had been asked to provide services to [the student] and had been given a reasonable opportunity to complete the process of evaluating [the student] and making a placement recommendation.'" *Ash,* 980 F.2d at 589 (quoting *Ash,* 766 F.Supp. at 864).

In this case, T.A.'s parents did not notify the School District before removing T.A. from public school. Instead, shortly after enrolling T.A. in private school, T.A.'s parents notified the School District, attended several meetings with school officials, and made T.A. available for evaluation. At the conclusion of its evaluation in July 2003, the School District nevertheless concluded that T.A. was not disabled and therefore declined to offer him special education services under the IDEA. In other words, after "[the School District] had been asked to provide services to [T.A.]

and had been given a reasonable opportunity to complete the process of evaluating [T.A.] and making a placement recommendation," *id.*(internal quotation marks omitted), the School District still failed to recognize T.A. as disabled or to offer him a free appropriate education. Thus, the district court would be within its discretion to consider notice as a relevant factor in its reimbursement determination.

Additionally, as we have noted in other cases, "[f]actors to be considered [by the district court] include[ ] the existence of other, more suitable placements, the effort expended by the parent[s] in securing alternative placements[,] and the general cooperative or uncooperative position of the school district." *W.G.*, 960 F.2d at 1487 (internal quotation marks omitted); *accord Adams v. Oregon,* 195 F.3d 1141, 1151 (9th Cir.1999); *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.,* 790 F.2d 1153, 1161 (5th Cir.1986). We are mindful that the Hearing Officer found that T.A.'s parents sent him to Mount Bachelor Academy not only because of his disabilities, but also for reasons unrelated to his disabilities (i.e., substance abuse and behavioral problems), and the district court would be acting within its discretion to consider that factor as well.

REVERSED AND REMANDED.

RYMER, *Circuit Judge*, dissenting:

I part company because I don't believe this is a *Burlington*[1] case calling for equitable reimbursement, or that we should adopt the reasoning of the Second Circuit in *Frank G. v. Board of Education of Hyde Park*, 459 F.3d 356 (2d Cir.2006).

I read *Burlington, Florence County School District Four v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993), 20 U.S.C. § 1412(a)(10)(C), and the regulations,[2] as indicating that tuition reimbursement for unilateral private placements is available under principles of equity only when FAPE was at issue before the child was withdrawn from public school and the school district had improperly denied a free and appropriate education. This was true in each of these cases, yet is not true here. Even if Congress meant the 1997 amendments to preserve equitable reimbursement where the child has never been enrolled in special education and related services, I doubt that it intended to *expand* the principle. At most, it seems to me, § 1415(i)(2)(C) carries forward the pre-1997 law on equitable relief. And as I see it, this case does not fall within the *Burlington* heartland because FAPE was not at issue when T.A.'s parents unilaterally withdrew him from the public sector.

In 2001, while T.A. was in public school, T.A.'s mother explicitly agreed with the school district's assessment that T.A. was not eligible for special

[1] *Burlington Sch. Comm. v. Mass. Dep't of Educ.*, 471 U.S. 359, 105 S. Ct. 1996, 85 L.Ed.2d 385 (1985).

[2] *See* 34 C.F.R. § 300.403 (1999) ("Placement of children by parents if FAPE is at issue"); 34 C.F.R. § 300.148 (2006) ("Placement of children by parents when FAPE is at issue").

education services. T.A. was taken out of public school and enrolled in a three-week wilderness program because he had begun to binge on marijuana and had run away from home in early 2003. No Independent Education Plan (IEP) had been requested, proposed, or disputed before then. Likewise, no IEP was on the table prior to T.A.'s enrollment at Mt. Bachelor Academy. Thus, unlike "all *Burlington* reimbursement cases," where "the parents' rejection of the school district's proposed IEP is the very reason for the parents' decision to put their child in a private school," *Carter,* 510 U.S. at 13, 114 S.Ct. 361, T.A.'s parents decided to put him in a private school for reasons of their own. Accordingly, T.A.'s parents have no right to equitable, retroactive reimbursement for private placement expenses.

This squares with the statutory scheme as well. If FAPE were *not* at issue and T.A. was *not* receiving special education and related services before withdrawal from public school, then he was being provided a free appropriate public education. A local educational agency that has made a free appropriate public education available has no obligation to pay the cost of education (including special education and related services) of a child with a disability at a private school when the parents elect the private placement. 20 U.S.C. § 1412(a)(10)(C)(i). However, if a child *has* previously received special education and related services, costs of a private placement may be reimbursed if a court or hearing officer finds that the school district had not made a free appropriate public education available to the child in a timely manner

prior to the private enrollment. *Id.* § 1412(a)(10)(C)(ii).[3]

That FAPE was not at issue before T.A. was withdrawn also distances this case from *Frank G.*, upon which the majority relies, for there the school district *had* prepared an IEP with which the parents were dissatisfied at the time of the private placement. This case is far closer factually to *Greenland School District v. Amy N.*, 358 F.3d 150 (1st Cir.2004), where-as here-FAPE was *not* at issue when the child's parents unilaterally removed her from public school. If it were necessary to choose between *Frank G.* and *Greenland, Greenland* is the more analogous precedent. But even on the majority's take, it seems unnecessary to me to embrace (or reject) the rationale of either case to resolve T.A.'s appeal. The court could simply hold, consistent with our precedent in *Ash,* that the ball game changed once a due process hearing was requested. *See Ash v. Lake Oswego Sch. Dist.*, 980 F.2d 585, 589 (9th Cir.1992) (recognizing right to reimbursement after the school district was first asked to provide services and had been given a reasonable opportunity to complete the process of evaluating the child and making a placement recommendation).[4]

[3] In the latter situation, the cost of reimbursement may be reduced or denied if the parents at the latest IEP meeting failed to tell the IEP team they were rejecting the public agency's proposed placement, or the parents had not given 10 days notice to the district prior to removal; the parents didn't cooperate; or the parents' actions are found to be unreasonable. *Id.* § 1412(a)(10)(C)(iii).

[4] It is unclear to me whether a right to an IEP arose at that time given the district's "child find" obligations, *see, e.g.*, § 1412(a)(10)(A)(ii), because the issue was not briefed in these

This said, assuming that equitable principles extend to this situation, I do not understand the court's opinion to compel a finding of reimbursement on remand. T.A. was unilaterally pulled from public school and placed in private school on account of drug issues, not learning disabilities; the parents receded from their position that T.A. was not entitled to special education services only after voluntarily placing him in private school and consulting an attorney; and there is no evidence of any change in T.A.'s need for special education services in the meantime. In these circumstances, the district court may well find again that T.A.'s parents assumed the financial risk of their own decision and that reimbursement is not "appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii).

terms. But whatever the effect, it seems plausible that the case at that point would be on a different track from the one taken here because by then, T.A. was voluntarily in private school, entirely at the parents' initiative, without involvement of the school district and without FAPE being at issue. Otherwise, there would be no point to the distinctions drawn in the statute between children enrolled in private schools by their parents without consent of, or referral by, the school district and those placed in private schools by public agencies, *see* §§ 1412(a)(10)(A), (B), and (C); or to the requirements and limitations set forth in § 1412(a)(10)(C) with respect to the payment of costs for education of children placed in private schools without district involvement.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CV 04-331-MO

FOREST GROVE SCHOOL DISTRICT,
Plaintiff-Appellant,

v.

T.A.,
Defendant-Appellee.

Andrea L. Hungerford
Richard G. Cohn-Lee
The Hungerford Law Firm
615 High Street
Oregon City, Oregon 97045
Attorneys for Plaintiff-Appellant

Mary E. Broadhurst
Mary E. Broadhurst, P.C
P.O. Box 11377
Eugene, Oregon 97440
Attorney for Defendant-Appellee

OPINION AND ORDER

MOSMAN, *Judge*:

Plaintiff Forest Grove School District (the District) files this appeal pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400, *et seq.*, from the order of the hearing officer that the District reimburse the parents of defendant T.A. the

necessary costs incurred in sending T.A. to Mount Bachelor Academy.

FACTS[1]

T.A. has been a student in the District since kindergarten. From kindergarten through 8th grade, a number of T.A.'s teachers indicated T.A. was having difficulty paying attention in class and completing his school work. In elementary school, T.A.'s mother, and to a lesser extent, his father, assisted T.A. with his homework or school work at home.

When T.A. reached high school, T.A.'s mother helped him complete his class assignments and homework almost every day after school and sometimes on weekends. T.A.'s parents observed that he was completely disorganized and could not keep track of work done or whether he had turned in his work. T.A.'s 9th grade World Studies teacher had extensive contact with T.A.'s parents about current and future assignments. During the course of the year in World Studies, T.A. failed to turn in eleven out of thirty-four assignments and turned in five assignments late. Despite these problems, T.A. was doing better than about one-third of the students in the World Studies class in terms of missed assignments and better than average in terms of late assignments.

2001 IDEA Evaluation

In December 2000, while T.A. was a freshman, his mother contacted the school counselor concerned over the discrepancy in what teachers said he was capable of and what he was actually doing in school. The school counselor recommended referral for an

[1] The facts as stated were found by the hearing officer and are not disputed by the parties.

evaluation for special education services indicating difficulties in the classroom with missing assignments; not following verbal directions; talking; not following written directions; being easily distracted; having low test scores; not doing work or turning in work late; having a short attention span; and not doing much homework. District staff notes for a Multidisciplinary Team meeting on January 16, 2001 include in the discussion of the Referral, "'Maybe ADD . . . /ADHD?'" Exhibit 1 to Amended Complaint, p. 6. The District received a medical statement for T.A. on June 8, 2001. In response to a question about health conditions affecting T.A.'s educational performance, the medical statement indicated that T.A. needed glasses.

In June 2001, T.A. was evaluated by a school psychologist to determine whether he had a learning disability. The school psychologist reviewed school records, interviewed T.A., and administered tests of cognitive ability. The school psychologist did not feel that the difficulties indicated on the Referral triggered an evaluation for Attention Deficit Hyperactivity Disorder (ADHD). A formal observation of T.A. by special education teacher Jerre Ann Pappelis in class in the spring of 2001 showed that T.A. worked quietly and independently and was appropriate. The evaluation results were considered at a meeting on June 13, 2001 at which T.A.'s mother, the school psychologist, and two other school officials were present. All four agreed that T.A. did not have a learning disability and was not eligible for special education services. Considerations discussed at the meeting were possible tutoring for T.A. in math over the summer, credit recovery or a tutorial in the fall, and reconsideration of eligibility depending on T.A.'s progress in the fall. After T.A. was found not eligible

for special education in June 2001, neither his parents nor any staff member at the high school referred him for or requested a special education evaluation while T.A. was enrolled in the high school.

Notice of Procedural Safeguards

Between December 31, 2000 and June 13, 2001, the District sent or gave T.A.'s parents at least one copy of the Notice of Procedural Safeguards which included information as to when reimbursement for private school education can be reduced or denied. The Notice gave the following advice about reimbursement for parental placements:

> *When Reimbursement May Be Required.* A court or hearing officer may require a school district to reimburse parents for the cost of private school placement made without the consent of or referral by the school district only if:
>
> - the child received special education and related services under the authority of a public agency before enrolling in the private school;
> - the court or hearing officer finds that at that time the school district did not make a free appropriate public education available to the child in a timely manner; and
> - parent provided notice removing the child from public school.
> - The court or hearing officer may reduce or deny reimbursement if the parents did not inform the school district that they were rejecting the placement proposed by the school district and state their concerns and their intent to enroll their child in a private

school at public expense. This notice must be given either:

- at the most recent [Individualized Education Plan (IEP)] meeting that the parents attended before removing the child from public school; or
- in writing to the school district at least ten business days before removing the child from public school.

Exhibit 1 to Amended Complaint, p. 10, ¶ 35.

Performance at the High School

In the five semesters that T.A. attended Forest Grove High School as a freshman, sophomore, and first semester junior, his grades ranged from As to Fs. He received the following grades in the core classes: Math - C, F, C, C, C; English - C, F, C, D, C; and Social Studies - C, C, D, D, B. His final grade point average at the end of 8th grade was 2.00; at the end of 9th grade was 1.85; at the end of 10th grade was 1.64; and at the end of the first semester of 11th grade was 1.38. He was progressing with his class from grade to grade. The only major disciplinary infraction in T.A.'s years of attending Forest Grove High School occurred in September 2001 when T.A. was suspended when he brought a knife to school with the stated intent of self-protection after school in Portland.

In November 2001, during his sophomore year, T.A.'s parents hired his sister, who was home from college for a year, to tutor him ten hours per week because T.A. was behind in his school work. By the 12th week of school, T.A.'s intermediate grades had greatly improved. Thereafter, T.A. stopped working

with his sister and became disorganized. He fell behind, and his grades went down. T.A. began using marijuana sporadically early in the winter of 2002.

In the fall of 2002, T.A. began his junior year at Forest Grove High School. The previous summer, T.A. had acknowledged to his parents that he had been trying marijuana but that he really wanted to change things. His first progress report in his junior year was his best in high school with four As, two Bs, and one C/D. Other than keeping track of his assignments and making sure he was doing his homework, his parents did not provide much help with his school work. By November 2002, T.A.'s progress report indicated that he was not turning in work and was falling behind in school. T.A. was having angry outbursts and big mood swings at home; he dropped choir and guitar lessons; and he was using marijuana again with increasing frequency.

Behavior and Substance Abuse Problems

On January 27, 2003, Dr. Michael Fulop saw T.A. and his parents for an initial diagnostic interview. A new semester at school began around February 3, 2002. On February 11, 2003, T.A. ran away from home and stayed overnight at a friend's house. On February 14, 2003, T.A. was picked up by the police and returned home. He confessed to his parents that he had been using marijuana on a fairly regular basis. In the weeks before he ran away, T.A. had been very "spacey" and reclusive. On some days, he was so drugged he could not get out of bed or speak. He made over $1000 worth of telephone calls to sex talk lines and had scanned Internet pornography sites before his parents removed the computer from the home.

When he returned home on February 14, 2003, his parents brought him to see his therapist, Dr. Susan Patchin. Dr. Patchin began seeing T.A. and his parents in April 2000 for problems in school and anger difficulties. Dr. Patchin had diagnosed T.A. with major depressive disorder. T.A. refused to stop using marijuana, to control his angry outbursts, or to comply with his parents' wishes. His parents took him to a hospital emergency room where he was evaluated and discharged to the care of his parents. His parents did not feel safe supervising him at home without additional support and feared he might harm himself.

On February 21 and 24, 2003, T.A. spent four hours with Dr. Fulop for evaluation and testing.

In January 2003, T.A. and his father had arranged with Gordon Garlock at the high school that T.A. would apply to the PCC Partnership Program in the hope that he could finish his high school requirements at PCC. On February 27, 2003, T.A.'s father called Sue Voigt, an assistant principal at the high school, and informed her that T.A. was undergoing medical testing, would enter a three-week wilderness training program, and would be attending Portland Community College (PCC) in the spring. T.A. would not be returning to Forest Grove High School. On February 28, 2003, T.A.'s father informed Mr. Garlock that T.A. was enrolled at PCC, had completed his placement tests, and had met with an advisor.

On March 2, 2003, T.A. entered the Catherine Freer Wilderness Therapy Expeditions (Freer) residential treatment program. He was admitted to Freer due to substance abuse and oppositional behavior.

On March 10, 2003, T.A.'s father told Ms. Voigt, the assistant principal at the high school, that T.A. was registered at PCC as previously arranged through the high school and was officially disenrolled from Forest Grove High School. T.A.'s father never informed Ms. Voigt that he was dissatisfied with the District's placement of T.A. at PCC, and Ms. Voigt believed that T.A. was attending PCC in the Partnership Program at the beginning of the spring quarter of his junior year.

On March 12, 2003, staff at Freer informed T.A.'s parents that Freer was recommending a structured, therapeutic, out-of-home placement that would address T.A.'s depression and drug use. One day later, his parents were looking for an alternative home for T.A. in Oregon or Washington.

On March 14, 2003, Dr. Fulop met with T.A.'s parents to discuss his evaluation of T.A. and the report he was preparing. Dr. Fulop gave T.A. a diagnoses of ADHD; combined subtype;[2] and a dysthmic disorder, a form of depression with relatively long-term symptoms such as sadness, pessimism, very little motivation at times, not a lot of excitement, and often tiredness and feelings of guilt. Dr. Fulop found that T.A. had learning problems with auditory memory, auditory discrimination, expressive language, organization, and combinations of the foregoing. He identified T.A.'s academic functional limitations as

[2] Under the current version of the *Diagnostic and Statistical Manual of Mental Disorders*, ADHD is the "'main disorder' and there are three subtypes inattentive, hyperactive, and combined. The main elements are attention problems, hyperactivity at times, motivational problems, and difficulty with executive functioning . . . ." Exhibit 1 to Amended Complaint, p. 20, n.21 (citing Transcript, pp. 272-73).

reading speed; timed tests; spells poorly; confusion with number sequencing (hearing 233 instead of 332); difficulty with equations; difficulty expressing himself; very slow in speech; organization skills; incomplete work; incomplete assignments; unorganized note taking; cannot use outline; poor recall of material. Dr. Fulop gave T.A. additional diagnoses of math disorder and cannabis abuse. Dr. Fulop recommended that T.A. attend Mount Bachelor Academy (MBA) to work on his academic and therapeutic challenges. Dr. Fulop thought T.A. should be in an environment where he could work on his drug issues and school-related issues and address both his ADHD and his depression. He recommended a residential program for T.A. because of T.A.'s failure to live up to his potential in school; his difficulties at home; his attitude toward his school; his sense of hopelessness; and his drug and alcohol problem.

On March 22, 2003, T.A's parents picked T.A. up from Freer. At the time of his discharge, T.A. made a commitment to abstain from alcohol and marijuana. Freer staff questioned the sincerity of T.A.'s commitment and recommended that T.A. have 24-hour adult supervision; live in a structured environment with clear rules and expectations; and participate in an ongoing drug and alcohol, cognitive behavioral, and family therapy. The discharge report written by Freer staff identified T.A.'s primary diagnoses as cannabis dependence and his secondary diagnosis as depression NOS.

Enrollment at MBA

On March 24, 2003, T.A.'s parents enrolled T.A. by telephone in the residential program at MBA. The next day, they took T.A. to Prineville, Oregon to begin attending MBA. MBA is a residential school

which describes itself as providing a "'well-rounded academic and emotional growth curriculum that is designed for children who may have academic, behavioral, emotional, or motivational problems.'" Exhibit 1 to Amended Complaint, p. 23, ¶ 90. Most of the 85 students at MBA have some type of learning disability, and approximately forty percent or more have ADHD. Many of the students have drug and alcohol abuse issues. Monthly tuition at MBA is $5,200.

Lisa Fairman, the learning aids coordinator at MBA, observed that T.A. "'struggle[d] with education' had an extremely difficult time focusing in class, being motivated to want to do well in class, sometimes to even get to the classroom." Exhibit 1 to Amended Complaint, p. 24, ¶ 94. In October 2003, Ms. Fairman identified T.A.'s greatest need, academically, as learning how to keep himself engaged in a task even if it was not something he wanted to be doing, including setting up some self-motivators to help himself get through such tasks. T.A. had a student action plan at MBA with academic, social and other goals. His first academic goal was to "develop self-management skills for ADHD to improve his academic performance and to help prepare for further education or a vocation." *Id.* at ¶ 93.

On March 28, 2003, T.A.'s father hired counsel to find out what the parents' rights were and to notify the District in writing of what T.A.'s parents were doing.

IDEA Hearing Request and Evaluation

On April 18, 2003, T.A.'s parents requested a hearing seeking an order requiring the District to evaluate T.A. in all areas of suspected disability. The District initiated the evaluation process.

In April 2003, school officials at Forest Grove High School learned that T.A. was not attending PCC in a conversation with Betty Flick, the Director of Student Services for the District.

In June 2003, Dr. Patricia Neill, a school psychologist, was engaged by the District to assist in determining whether T.A. had a disability that significantly interfered with his educational performance in the general education program. Dr. Neill reviewed Dr. Fulop's testing and evaluation, T.A.'s school records, reports from Freer, records from MBA, and a report by Dr. Patchin. Dr. Neill interviewed Forest Grove High School staff. Dr. Neill visited MBA, spoke with T.A., reviewed MBA records, and observed T.A. in class at MBA. Dr. Neill recommended a meeting be held to review the evaluation results and determine whether T.A. was eligible for special education services.

Betty Flick was the Director of Student Services for the District. She was responsible for testing and evaluation for special education services for about half of the students in the District. Ms. Flick estimated for the hearing officer that throughout the District there might be 285 to 570 students (five to ten percent of the student population) with ADHD, with 27 on 504 plans as qualified handicapped persons for ADHD, and at least 27 eligible under the IDEA as an Other Health Impairment due to ADD or ADHD. In the opinion of Ms. Flick, the difference between those who did and did not qualify for services under the IDEA or 540 plans was "'definitely the severity of the behaviors that they demonstrate within the school setting.'" Exhibit 1 to Amended Complaint, p. 29, ¶ 113 (quoting Transcript, pp. 364-65). Ms. Flick reviewed T.A.'s grade record and

concluded that his "ADHD was not having an adverse impact on his educational performance because he was not having academic difficulties 'across the board in all classes,' and had gotten Bs or Cs in some of the more challenging academic classes (for example, world studies)." *Id.* (quoting Transcript, p. 419-20). Although T.A. had received some failing grades, "he was not 'flunking out' of school, and was advancing with his class at [the high school] at the end of each semester until he left the school." *Id.* Ms. Flick noted that many students at Forest Grove High School did not turn in their homework and related this, at least in part, to the fact that the District had a very high proportion of families who were not wealthy and students who were eligible for free and reduced lunch and/or holding down jobs as well as attending school. Ms. Flick noted that there were many students in the District for whom English was a second language, and that the number of failing grades T.A. received at the high school was not unusual. Ms. Flick noted in the fall semester of 2002, approximately 210 of the 504 freshman students in the District had the grade of F in one or more classes. In the fall of 2003, the high school had a new plan to assist students who had three or more grades of F (out of 8 classes) on a progress report.

2003 IDEA Meeting

On July 7, 2003, a Multidisciplinary Team (MDT) met to determine whether T.A. met the disability criteria in the IDEA for a learning disability, emotional disturbance, or other health impairment. The participants included T.A.'s parents; Dr. Patchin; Ms. Flick; Mr. Garlock; Shelly Reikofski, T.A.'s algebra teacher; Dr. Neill; and Ms. Pappelis. Nancy Hungerford and Mary Broadhurst, attorneys, were

also present. Dr. Patchin submitted a statement indicating that health conditions that affected T.A.'s educational performance were major depressive disorder; dysthymic disorder; and ADHD, combined type. T.A.'s parents described T.A.'s struggles and behaviors and the amount of work they did throughout his school career to enable him to complete his homework and school work. One or more of the MDT members said T.A.'s school record did not show an adverse affect on his school performance since he was not completely failing school, although his grade point average had dropped significantly since middle school. When T.A.'s parents brought up incidents in T.A.'s school history that required parent visits to school and conferences with teachers, T.A.'s depression and anxiety issues, and his daily struggles with homework, Dr. Neill and possibly one or more of the MDT members responded that the information was not in school records and should have been brought up earlier.

The MDT acknowledged that T.A.'s emotional or behavioral problems had existed over an extended period of time, but all members except T.A.'s parents and Dr. Patchin agreed that T.A. did not qualify for special education in the area of emotional disturbance or learning disability. In the area of other health impairment, the MDT concluded that T.A.'s condition, ADHD, was permanent or expected to last for more than 60 calendar days, but the majority declined to find that his disability had an adverse impact on his educational performance. When the District representatives of the MDT discussed the question of whether T.A.'s disabilities Other Health Impairment and depression had an adverse impact on his educational performance, they considered whether these disabilities had a "severe, significant

impact" and concluded it was not severe enough. Exhibit 1 to Amended Complaint, p. 31, ¶ 124 (quoting Transcript, p. 660).

On August 26, 2003, the District conducted a Section 504 eligibility meeting for T.A. in order to determine whether he was eligible for services under Section 504 of the Rehabilitation Act as a qualified handicapped person. The MDT determined that T.A.'s diagnoses of ADHD and depression did constitute a physical or mental impairment, but that this impairment did not substantially limit T.A.'s ability to learn or care for himself, and that a Section 504 plan was not required for T.A.

Due Process Hearing

T.A.'s parents requested a due process hearing. On September 25 and 26, and October 2, 3, 17 and 22, 2003, an administrative hearing was held. Thereafter, the hearing officer issued a final order concluding that:

(1) The District had the burden of proving that it offered T.A. a free appropriate public education (FAPE) under the IDEA, including an appropriate evaluation. The District failed to meet that burden.

(2) T.A. is eligible for special education under the IDEA as a student with an Other Health Impairment.

(3) T.A. is eligible for services under Section 504 of the Rehabilitation Act of 1973 as a qualified handicapped person.

(4) The District is not responsible for reimbursing the parents for the costs of the evaluation by Dr. Fulop.

(5) The District is not responsible for reimbursing the parents for the cost of Freer.

(6) Until the District offers T.A. a FAPE, the District is responsible for reimbursing the parents for their necessary expenses to send T.A. to MBA.

Exhibit 1 to Amended Complaint, p. 34. The hearing officer concluded that the District's evaluation of T.A. in 2001 was inadequate as the District failed to assess T.A. for ADHD,[3] and the District failed to identify T.A. correctly in July and August 2003 as a student eligible for special education services under the IDEA. The hearing officer concluded that T.A.'s ADHD had an adverse impact on his educational performance, and T.A. needed special education services as a result of that disability. The hearing officer concluded:

> [T.A.] was able to progress from grade to grade in the regular curriculum in his first five semesters at [Forest Grove High School] because his parents and sister provided him with what was in effect special education at home. It is, however, the responsibility of the District and not the parents to provide a [free appropriate public education] for T.A. Therefore the District is liable for the necessary costs of T.A.'s education at Mt.

[3] The adequacy of the 2001 evaluation was not an appropriate subject for the 2003 due process hearing. The hearing officer found that TA.'s mother was present at the June 13, 2001 MDT meeting and agreed with the determination that T.A. "was found not to have a learning disability and determined to be ineligible for special education." Exhibit 1 to Amended Complaint, p. 8. No further request for evaluation or special services was made by T.A.'s parents or teachers while T.A. was enrolled in the high school. *Id.* at 9.

> Bachelor Academy an appropriate placement until it offers T.A. at [sic] [free appropriate public education]. . . .
>
> The fact that it was T.A.'s escalating drug abuse, depression and out of control behavior that caused his parents to remove him (temporarily, they anticipated) from [Forest Grove High School] and the District does not diminish the legal significance of the District's failure to offer T.A. a [free appropriate public education], or the legal right of T.A.'s parents to be reimbursed for providing him with an appropriate education at Mt. Bachelor Academy.

Id. at 2-3.

T.A. graduated from the emotional growth program and received a high school diploma from MBA in June 2004.

APPLICABLE LAW

The IDEA provides federal funds to assist state and local agencies in educating children with disabilities conditioned upon compliance with certain goals and procedures. 20 U.S.C. §§ 1412, *et seq.* To receive financial assistance from the federal government under the IDEA, a State must ensure, among other requirements, that a free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21 with certain exceptions not relevant in this case. 20 U.S.C. § 1412(a)(1). Federal regulations to implement the IDEA are found at 34 C.F.R. pt. 300, and these federal regulations are mirrored in substantial part in the Oregon Administrative Rules (OAR) 581-015-0005, *et seq.* Regulations implementing Section 504 of the Rehabilitation Act of 1973, provide that a

handicapped person with respect to secondary educational services includes a person to whom a State is required to provide free appropriate public education under the IDEA. 34 C.F.R. § 104.3(1)(2)(iii).

The free appropriate public education to which a disabled child is entitled under the IDEA "does not mean the absolutely best or 'potential-maximizing' education." *Ash v. Lake Oswego Sch. Dist.*, 980 F.2d 585, 587 (9th Cir. 1992) (quoting *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987)) (internal quotation marks omitted). The "states are obliged to provide 'a basic floor of opportunity' through a program 'individually designed to provide educational benefit to the handicapped child." *Ash*, 980 F.2d at 587 (quoting *Board of Educ. v. Rowley*, 458 U.S. 176, 201 (1982)) (internal quotation marks omitted).

Children with disabilities under the IDEA includes children who require special education because of an "Other Health Impairment" defined in OAR 581-015-0005(4) as follows:

> (h) "Other Health Impairment" means limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment, that:
>
> (A) Is due to chronic or acute health problems (e.g. a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, attention deficit disorder, attention deficit hyperactivity disorder, leukemia, or diabetes); and
>
> (B) Adversely affects a child's educational performance.

The criteria for evaluation and for an eligibility determination for "Other Health Impairment" are provided in OAR 581-015-0051(8) as follows:

(a) If a child is suspected of having another health impairment, the following evaluation shall be conducted:

(A) A medical statement or a health assessment statement, indicating a diagnosis of a health impairment or a description of the impairment, and a statement that the child's condition is permanent or is expected to last for more than 60 calendar days;

(B) Assessments to determine the impact of the suspected disability:

(I) On the child's educational performance for a school-age child; or

(II) On the child's developmental progress for a preschool child.

(C) Additional evaluations or assessments that are necessary to identify the child's educational needs.

(b) For a child suspected of having another health impairment, the child shall meet all of the minimum criteria:

(A) The child exhibits limited strength, vitality or alertness, including a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment;

(B) The child's limited strength, vitality or alertness is due to a chronic or acute health problem; and

(C) The child's condition is permanent or expected to last for more than 60 calendar days.

(c) For a child to be eligible for special education services as a child with another health impairment, the eligibility team shall determine that:

(A) The child's disability has an adverse impact on the child's educational performance; and

(B) The child needs special education services as a result of the disability.

If a parent is dissatisfied with the determination of a school district concerning the identification, evaluation, or educational placement of a child, the parent may request a due process hearing. 20 U.S.C. § 1415(f) and O.R.S. 343.165(1)(a). Oregon law provides for such a hearing before an independent hearing officer appointed by the Superintendent of Public Instruction. O.R.S. 343.165(8). Any party aggrieved by the hearing officer's decision may seek further review in state or federal court. 20 U.S.C. § 1415(i)(2)(A) and O.R.S. 343.175(2).

Upon review, the court is required to receive the records of the administrative proceedings, hear additional evidence at the request of a party, and base its decision on the preponderance of the evidence. 20 U.S.C. § 1415(i)(2)(B).[4] The court must consider the administrative findings, but it is within the court's discretion to "reject the findings in part or in whole." *Ojai Unified Sch. Dist. v. Jackson,* 4 F.3d 1467, 1474 (9th Cir. 1993). The amount of deference that the court accords the hearing officer's findings

[4] The parties in this case have not submitted additional evidence or requested a further hearing.

increases where they are "'thorough and careful.'" *Capistrano Unified Sch. Dist. v. Wartenberg,* 59 F.3d 884, 891 (9th Cir. 1995) (quoting *Union Sch. Dist. v. Smith,* 15 F.3d 1519, 1524 (9th Cir. 1994)). Upon review, the party challenging the administrative ruling has the burden of proof. *Clyde K v. Puyallup Sch. Dist.,* 35 F.3d 1396, 1399 (9th Cir. 1994).

CONTENTIONS OF THE PARTIES

The District contends that 1) tuition reimbursement should be denied because T.A.'s parents unilaterally removed him from public school to a private placement without requesting special education services or providing any notice of their desire that the District pay for private placement; 2) the hearing officer erred in finding T.A. eligible for special education services under the IDEA; and 3) the hearing officer erred as a matter of law by making the District responsible for T.A.'s drug abuse treatment.

T.A. contends that 1) the hearing officer correctly determined that the notice provision of the IDEA does not apply because he had not previously received special education and his parents have an equitable right to reimbursement; 2) the hearing officer correctly found that T.A. qualified for services under the IDEA; and 3) the hearing officer correctly found that T.A.'s drug use did not make him ineligible for services under the IDEA.

ANALYSIS

This court accepts the facts as found by the hearing officer and has given the legal conclusions of the hearing officer substantial deference. However, this court exercises its independent judgment based upon a preponderance of the evidence as to whether the

legal conclusions reached by the hearing officer are supported by the facts. *See Capistrano Unified Sch. Dist.*, 59 F.3d at 892.

Eligibility for Tuition Reimbursement Pursuant to 20 U.S.C. §1412(a)(10)(C)

In *School Comm. of Burlington v. Department of Educ. of Mass.*, 471 U.S. 359, 369 (1985), the United States Supreme Court held that the IDEA's grant of equitable authority under 20 U.S.C. §1415(e)(2) empowers a court "to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act." The 1997 amendments to the IDEA subsequently addressed the circumstances under which tuition reimbursement may be available, including a section entitled "Payment for education of children enrolled in private schools without consent of or referral by the public agency," 20 U.S.C. § 1412(a)(10)(C). This section begins by stating that the IDEA does not "require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." 20 U.S.C. § 1412(a)(10)(C)(i). This provision states:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer

> may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

20 U.S.C. § 1412(a)(10)(C)(ii). The court may reduce or deny the cost of reimbursement if the parents did not inform the District at the most recent IEP of their intent to enroll their child in private school at public expense or give written notice to the District ten business days prior to removal and private placement. 20 U.S.C. § 1412(a)(10)(C)(iii)(I). The statute provides specific exceptions to this notice requirement; for example, if the parent is illiterate and cannot write in English, if compliance with notice would likely result in physical or serious emotional harm to the child, or if the parents have not received notice of the notice requirement. 20 U.S.C. § 1412(a)(10)(C)(iv).

In *Greenland Sch. Dist. v. Amy N.* 358 F.3d 150 (1st Cir. 2004), the parents of a student who had not received special education services argued that the prior notice provision of the IDEA did not apply when the student had not previously received special education in the public school system. The parents in *Greenland* unilaterally removed their daughter, diagnosed with ADHD, from public school at the end of the 4th grade and placed her in private school without raising the issue of special education services. After almost a year, the parents sought tuition reimbursement. The circuit court denied tuition reimbursement, noting that "there was no notice at all to the school system before Katie's removal from Greenland that there was any issue

about whether Katie was in need of special education." *Id.* at 160. The circuit court reviewed the 1997 amendments to the IDEA and concluded:

> These statutory provisions make clear Congress's intent that *before* parents place their child in private school, they must at least give notice to the school that special education is at issue. This serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a free appropriate public education can be provided in the public schools.

Id. at 160. The circuit court concluded that "a child like Katie who is removed from her school without her parents or her school ever questioning the availability of FAPE is not within the category of children eligible for tuition reimbursement." *Id.* at 161.

Even for children who previously received special education services in the public school, the statute imposes limitations upon reimbursement for private placement without the consent or referral of the public agency. The cost of reimbursement may be reduced or denied if the parents do not give the school district notice of their intent to remove their child from public school before they do so "at the most recent IEP meeting that the parents attended prior to removal of the child from the public school" or by written notice ten business days prior to removal. 20 U.S.C. § 1412(a)(10)(C)(iii)(I). The requirement of notice before unilateral withdrawal and private placement is important to advance "[t]he IDEA's preference for a cooperative placement process." *Patricia P. v. Board of Educ. of Oak Park,* 203 F.3d 462, 468 (7th Cir. 2000) ("parents who, because

of their failure to cooperate, do not allow a school district a reasonable opportunity to evaluate their disabled child, forfeit their claim for reimbursement for a unilateral private placement").

In the case before this court, the District contends that T.A.'s parents were required by the IDEA to provide the District with notice that special education was at issue before they unilaterally placed T.A. in a private school and sought public funding for that placement. The District explains that T.A.'s parents failed to notify the District that T.A. needed evaluation or that T.A. needed special education services. T.A. contends that the hearing officer correctly concluded that any notice requirement in the IDEA applies only when a student had previously received special education services and did not apply in this case because T.A. had never received special education services.

The statutory language in section 1412(a)(10)(C)(ii) provides that "the parents of a child with a disability, who previously received special education and related services under the authority of a public agency" may receive tuition reimbursement for unilateral placement in a private school subject to the limitations in section 1412(a)(10)(C)(iii). Section 1412(a)(10)(C)(ii) cannot be read to authorize tuition reimbursement for a child enrolled in private school without the consent of or referral by the public agency, even though he was not "previously receiving special education" but exclude the child from the limitations on reimbursement contained in section 1412(a)(10)(C)(iii). In fact, T.A.'s argument turns the statutory language on its head. The plainest reading of the statute is that *only* children who had previously received special education services from the

District are even eligible for such tuition reimbursement. The plain reading of the statute, in other words, makes T.A entirely ineligible for reimbursement.

In any event, allowing tuition reimbursement under section 1412(a)(10)(C)(ii) for parents who did not request evaluation for special education services prior to deciding to withdraw their child from public school and seek reimbursement for private school runs contrary to the statutory language and the intent of Congress that parents and school authorities work cooperatively.

There is no dispute in this case that T.A.'s parents did not request evaluation or services subsequent to his evaluation in June 2001 and prior to his withdrawal from Forest Grove High School for drug treatment in April 2003. There was no notice to the school system prior to T.A.'s removal from Forest Grove High School in 2003 that T.A.'s parents felt that T.A. was in need of special education. The District had no opportunity to address special education issues within the public school setting. T.A. was initially evaluated for special education services during his freshman year and found to be not eligible. T.A.'s mother agreed with this conclusion, and the hearing officer found that the Notice of Procedural Safeguards provided to T.A.'s parents informed them, in part, that:

> A court or hearing officer may require a school district to reimburse parents for the cost of private school placement made without the consent or of referral by the school district only if:

- the child received special education and related services under the authority of a public agency before enrolling in the private school;
- the court or hearing officer finds that at that time the school district did not make a free appropriate public education available to the child in a timely manner; and
- parent provided notice removing the child from public school.

Exhibit 1 to Amended Complaint, p. 10, ¶ 35.

T.A. struggled academically and began using marijuana in his sophomore year. Neither T.A.'s parents nor his teachers raised any further issue of special education services through his sophomore year and his junior year prior to his enrollment in private school. At the start of the second semester of his junior year, T.A.'s parents took him to Dr. Fulop for an evaluation. The hearing officer found that T.A.'s parents "had the option of asking that the District pay for Dr. Fulop's evaluation of T.A. and if the District refused, the District would have had to initiate a due process hearing to show that its evaluation was appropriate. Instead the parents arranged for the evaluation by Dr. Fulop without informing the District that it was taking place." *Id.* at 41. Shortly thereafter, T.A.'s parents unilaterally removed him from school and placed him in a drug treatment program at Freer. The hearing officer found that "T.A. was sent to Freer due to substance abuse and oppositional behavior, after he binged on marijuana and ran away from home for several days." *Id.* at 44. Because "the placement at Freer was not appropriate to meet his educational needs," the hearing officer

found that T.A.'s parents were "not entitled to reimbursement for that placement." *Id.* The hearing officer found that Dr. Fulop and the staff at Freer recommended residential placement for T.A. based upon his drug use issues. In order to meet his educational needs, T.A., his parents, and the officials at Forest Grove High School had arranged in January 2003 for his placement in the PCC Partnership Program. T.A.'s private residential placement was a result of his drug use. T.A.'s parents did not inform the District that special education services were at issue prior to T.A.'s parents withdrawing him from public school and enrolling him in private school. This court concludes that the requirement of section 1412(a)(10)(C)(ii) that the student "previously received special education and related services" prior to unilateral removal and private placement in order to receive tuition reimbursement were not met because T.A.'s parents agreed with an evaluation two years earlier that T.A. was not eligible; T.A.'s parents had not requested any further evaluation or special services prior to removal from school; and T.A. was removed from school for reasons not related to special education services. T.A. is not within the category of children eligible for tuition reimbursement under section 1412(a)(10)(C). Furthermore, even if T.A. were eligible for tuition reimbursement, T.A.'s parents did not provide any notice to the District prior to unilateral private placement as they were required to do.

Eligibility for Tuition Reimbursement Under the General Principles of Equity

T.A. contends that the hearing officer had the discretion to award reimbursement under the general principles of equity, even if the tuition reimburse-

ment is not authorized under section 1412(a)(10)(C). T.A. contends that the District had ample information about his struggles in school, and that the District was informed that his parents were seeking tuition reimbursement within a month of his withdrawal from school. T.A. contends that the court should excuse the failure to request special education services or to provide notice of unilateral placement in private school because the District found him not eligible for special education services after his placement in private school.

The District contends that T.A.'s parents were informed of the IDEA procedures, unilaterally removed T.A. from public school and placed him in private school to address his drug problems without seeking special education services, and later sought public funding for their unilateral placement. The District contends that T.A.'s educational performance was not notably different from other Forest Grove High School students with average intellectual ability, and that T.A.'s parents were familiar with their rights under the IDEA and removed T.A. from public school for residential drug treatment.

In *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 16 (1993), the United States Supreme Court stated:

> [W]e note that once a court holds that the public placement violated IDEA, it is authorized to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). Under this provision, "equitable considerations are relevant in fashioning relief," *Burlington*, 471 U.S., at 374, 105 S.Ct., at 2005, and the court enjoys "broad discretion" in so doing, *id.*, at 369, 105 S. Ct., at 2002.

Florence and *Burlington* involved students who were receiving special education services. The parents dissatisfied with the adequacy of the services challenged the Individual Education Plan (IEP) and later withdrew their child from public school and enrolled the child in private school without the consent of the school authorities. In addressing the unilateral action of the parents, the Court noted that the course of administrative and judicial review leave the parents faced with the difficult choice: "go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement." *Florence*, 510 U.S. at 365 (quoting *Burlington*, 471 U.S. at 370).

Section 1412(a)(10)(C) was enacted subsequent to *Florence* and *Burlington* providing tuition reimbursement for a student who previously received special education services placed in private school without the consent of school authorities. Even assuming that tuition reimbursement may be ordered in an extreme case for a student not receiving special education services, under general principles of equity where the need for special education was obvious to school authorities and the parents were uninformed or unable to request services, the facts in this case do not support such an exercise of equity. *See Greenland*, 358 F.3d at 160 n.8.

First, this is not a case where the school failed to inform parents of their rights and obligations under the IDEA. In fact, the parents acknowledge receipt of the Notice of Procedural Safeguards, which included their obligation to provide notice.

Second, this is not a case where it was obvious to the school that T.A. needed special education services.

T.A. maintained a C minus average, failing on average one class per semester. The Director of Student Services for the District testified that in the first semester of the 2002-2003 school year, 210 of the 504 freshman students in the District earned an F in one or more classes. Exhibit 1 to Amended Complaint, p. 29, ¶ 115 (citing Testimony of Betty Flick, Tr. 366). In the fall semester of his junior year, T.A. passed all of his core classes receiving a C in Algebra, a C in English, and a B in American History. School District Exhibits, Exhibit B11.

T.A.'s high school teachers testified at the hearing that T.A. was attentive in class, did his work, and was not a behavior problem or a distraction. For example, Tr. 187 "no behavioral problems;" Tr. 186 "was pretty well on task;" Tr. 483 "[h]e would come in, he would start his journal entry and he would be . . . be with it;" and Tr. 1320 "My experience with TA was good. He was a pretty good student. He was attentive for the most part, he attended regularly. He did a fine job." T.A.'s freshman World Studies teacher testified that despite missing and late assignments, T.A. earned a C in both semesters and "was doing better than I would say probably one third of my students." Tr. 1334. T.A.'s classroom behavior and attendance were consistently appropriate with one disciplinary incident and some tardies.

The need for special education services was not so obvious in this case that the general exercise of equity would override the statutory requirement for tuition reimbursement. T.A.'s academic performance was not unlike many students at Forest Grove High School. T.A.'s parents withdrew him from public school and enrolled him in a private residential school in order to address his drug use. T.A.'s parents

were informed of their rights under the IDEA and were able to request special education services prior to their unilateral decision to withdraw T.A. from public school. Equitable considerations would not support tuition reimbursement in this case.

CONCLUSION

IT IS HEREBY ORDERED that the conclusion of the hearing officer that the District is liable for the costs incurred in sending T.A. to Mt. Bachelor Academy is REVERSED. The court will enter judgment in favor of the District and against T.A.

DATED this 11th day of May, 2005.

/s/ Michael W. Mosman
MICHAEL W. MOSMAN
United States District Judge

APPENDIX C

BEFORE THE OFFICE OF
ADMINISTRATIVE HEARINGS (OAH)
STATE OF OREGON
for the
SUPERINTENDENT OF PUBLIC INSTRUCTION

OAH Case No. 20031306
Department Case No. DP 03-113

In the Matter of the Education of
T.A. v. Forest Grove School District

FINAL ORDER

HISTORY OF THE CASE

On April 18, 2003 Mr. and Ms. A., the parents of T.A., requested a hearing with regard to the education of T.A.[1] The Oregon Department of Education referred the request to the Office of Administrative Hearings on April 23, 2003. On May 6, 2003 the District moved to dismiss the hearing request. The first part of the hearing took place on May 21 and 23, 2003 and related to the Motion to Dismiss, which was denied.

The hearing continued at the office of the Forest Grove School District (District) or by telephone on September 25 and 26 and October 2, 3, 17 and 22,

[1] T.A. was 18 on September 11, 2003. He transferred his rights under the IDEA and Section 504 of the Rehabilitation Act of 1973 to his parents to act as his educational surrogates. *Ex 23.*

2003. Administrative Law Judge Betty Smith of the Office of Administrative Hearings presided. The parents were represented by Mary Broadhurst, attorney at law. The District was represented by Nancy and Andrea Hungerford, attorneys at law. Ms. A. and Mr. A. both testified. Other witnesses for the parents were A.A., T.A.'s sister; Lisa Fairman, Learning Aids Coordinator, Mt. Bachelor Academy; Dr. Susan Patchin and Dr. Michael Fulop, psychologists; and, from Forest Grove High School (FGHS), Gordon Garlock, Options counselor; Philip Thias, art teacher; and Vinny Martin, school psychologist. Testifying on behalf of the District from FGHS were Sue Voigt, Assistant Principal; Jerre Ann Pappelis, Learning Specialist and Special Needs Coordinator; and Lee O'Banion (retired), Shelly Reikofski, Ron Thompson (retired) and Jaime Vieth, regular education teachers. Betty Flick, Student Services Director for the District, Dr. L. Martha Callum, behavioral specialist, and Dr. Patricia Neill, school psychologist, also testified for the District.[2] The record remained open for the hearing transcript and post-hearing briefs and closed on December 8, 2003 when documents to accompany the closing briefs were received.

ISSUES

1. Is T.A. eligible as a student with a disability under the Individuals With Disabilities Education Act (IDEA)[3] in the area of Other Health Impaired or Emotionally Disturbed[4]?

[2] Bob Sorrell, Lorna Shofner and Michael Smith also testified for the District on May 21 or 23, 2003.

[3] 20 USC §1400 *et seq.*

[4] After the hearing T.A.'s parents withdrew the issue of whether T.A. was emotionally disturbed. *See* Opinion, below.

2. Is T.A. eligible as a student with a disability (qualified handicapped student) under Section 504 of the Rehabilitation Act of 1973[5]?

3. If T.A. is eligible, due to the District's failure to find T.A. eligible and offer him a free and appropriate public education, should T.A.'s parents be reimbursed for costs associated with securing and providing appropriate placements for T.A.?

EVIDENTIARY RULINGS

Exhibits A1 through A32 were admitted into the record. An objection to Exhibit A29 was overruled. Exhibits B1-B27 were admitted into the record without objection. Exhibits B1a through B18a[6] were admitted at the hearing on the District's Motion to Dismiss, as were Exhibits C1 and C2.

Note About the Transcript: The transcript of the May testimony relating to the Motion to Dismiss has the same page numbers as the transcript of the continuation of the hearing beginning on September 25, 2003. Citations to the first transcript are therefore identified as "MTr."

SUMMARY OF DECISION

T.A. has attended school in the District since kindergarten. As indicated by his school records, his teachers noted repeatedly through the years that

[5] Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 29 U.S.C. 794.

[6] These exhibits were originally numbered B1 through B18. The District used those numbers for different documents when submitting their exhibits for the hearing beginning on September 25, 2003. To avoid confusion these exhibits were renumbered.

T.A. had difficulties paying attention and completing his school work. These difficulties increased after T.A. entered FGHS in September 2000. The District's evaluation of T.A. in 2001 was inadequate as the District failed to assess T.A. for Attention Deficit Hyperactivity Disorder (ADHD) despite information which indicated that such an evaluation was appropriate. In addition the District at that time failed to pursue its own conclusion that T.A. might be eligible for services under Section 504.

Throughout T.A.'s high school education his mother (and sometimes his father and sister) worked with him for hours, almost daily, to assist him in completing his class work and homework. In March 2003 Dr. Fulop, a psychologist, issued a report diagnosing T.A. with ADHD. Although this and much additional information was available to the District, in July and August 2003 the District failed to identify T.A. correctly as a student with a disability who met the eligibility requirements for special education services under the IDEA, and as a qualified handicapped person under Section 504.

T.A.'s disability, an Other Health Impairment (ADHD), has an adverse impact on his educational performance; and T.A. needs special education services as a result of that disability. He was able to progress from grade to grade in the regular curriculum in his first five semesters at FGHS because his parents and sister provided him with what was in effect special education at home. It is, however, the responsibility of the District and not the parents to provide a FAPE for T.A. Therefore the District is liable for the necessary costs of T.A.'s education at Mt. Bachelor Academy an appropriate placement until it offers T.A. at FAPE. T.A. is also eligible for

services as a qualified handicapped person under Section 504 of the Rehabilitation Act of 1973.

The fact that it was T.A.'s escalating drug abuse, depression and out of control behavior that caused his parents to remove him (temporarily, they anticipated) from FGHS and the District does not diminish the legal significance of the District's failure to offer T.A. a FAPE, or the legal right of T.A.'s parents to be reimbursed for providing him with an appropriate education at Mt. Bachelor Academy.

The District is not required to reimburse T.A.'s parents for the cost of the evaluation by Dr. Fulop or T.A.'s stay at Catherine Freer Wilderness Therapy Expeditions.

FINDINGS OF FACT

Background

(1) T.A. is an 18 year old young man (born September 11, 1985) who has been a student in the Forest Grove School District (District) since kindergarten.

(2) From kindergarten through eighth grade a number of T.A.'s teachers indicated T.A. was having difficulty paying attention in class and completing his school work. *See Ex A28.* Their comments on his report cards included, "An area of improvement would be in staying on task during work periods and focusing attention for longer periods" (first grade, 1992-93); completes work on time: 35% third quarter and 60% fourth quarter (third grade, 1994-95); "Complete work on time by staying focused. I know you can" (fourth grade, 1995-96); "[T.A.] is very conscientious about making certain all work is turned in. He completes very few assignments during class" (fifth grade, 1996-97); "[T.A.] has had a better second

quarter! He still struggles with using time appropriately, paying attention, and being prepared for class. Despite these problems, he has gotten his homework turned in and his grades have improved," needs improvement in the areas of use of time and paying attention (6th grade, 1997-98); "Missing required work/projects/tests," "Does not use time productively" (7th grade, 1998-99); and "Needs to complete work on time," "Missing required work/projects/tests," "See teacher for incomplete work" (8th grade, 1999-2000). *Ex A29, Tr 856-60.*

(3) Although generally T.A.'s teachers liked him, and some especially appreciated his creativity and sense of humor, in the early years T.A. had some isolated behavior problems in school, and more at home. *Exs A28, 29.* When T.A. was eight years old he saw a therapist for anger management therapy and was diagnosed with potential oppositional disorder. *Exs A19, A28, Tr 1169.* Between the ages of 11 and 13 he routinely displayed destructive behavior at home, such as writing on the walls of his room, carving into the woodwork and breaking things. He was frequently angry with his parents and sister and experienced a lot of frustration. *Ex A19.*

(4) From the time T.A. was in elementary school Ms. A., and to a lesser extent Mr. A., have assisted T.A., when he does homework or school work at home. *Ex A28.*

(5) When T.A. reached high school, almost every day after Ms. A. returned home from work, and sometimes on the weekends, she would help T.A. stay focused on his school work and complete his class assignments and homework. *Tr 1154-55, 1363-64.* Sometimes, on school nights, she would work with him until 11:00 p.m., although she was not helping

him continuously. *Tr 1363.* Ms. A. worked with T.A. an average of at least two hours daily and sometimes three or four hours on the weekends, or possibly half a day if T.A. was working on a project or a paper or had a lot of work to make up. *Tr 1194.* At times over Christmas break, spring break and on weekends Ms. A. would bring T.A. to her work place (the library at Pacific University) and help him do his school work. Mr. A. helped T.A. in math (algebra) with catching up on old homework, completing current homework, and preparing for makeup tests. Also he and Ms. A. drilled T.A. on the multiplication tables so he could pass that portion of his algebra class. *Tr 1152.*

(6) When T.A. was in high school Mr. and Ms. A. had to give T.A. reminders to attend to his school work "many, many times a night," because he did not stay focused. They had to keep redirecting him with many time outs and specific instructions as to which task to work on. When T.A. got distracted he would run out of the room, sharpen his pencil repeatedly, run upstairs, look in the mirror, play with the cat, get a drink of water, etc. *Tr 1158-59. See also Tr 1192-93.*

(7) T.A. talked a lot about how hard it was for him to focus in high school. He got lost in lectures because his mind would soon wander and he could not figure out what the teacher was talking about. *Tr 1196-97.*

(8) In March 2003 T.A. was diagnosed by Dr. Michael Fulop with attention deficit hyperactivity disorder (ADHD), combined subtype, accompanied by deficiencies in executive functioning[7]. *Ex B5.* In as-

[7] Executive functioning has to do with the way the brain organizes itself. It includes initiating an action; sustaining attention and concentration; sustaining energy and effort; man-

sisting T.A. with his school work Mr. and Ms. A. had compensated for T.A.'s limitations by attempting to keep T.A. organized and ensure he remembered what he needed to do; helping T.A. figure out how to do it, when to do it, and how much time it would take; breaking down big projects into smaller steps; and helping T.A. get started, maintain focus and complete his work. It was really hard for T.A. to finish anything. *Tr 1180-82.*

(9) T.A. had friends in school but since the age of 12 had never invited anyone to his home, and almost never visited other students' homes. *A19, Tr 1047, 1163-64.* In high school he almost never participated in extracurricular activities. Until he started using marijuana heavily in his junior year of high school he very rarely socialized, outside of school, with anyone other than his relatives. *Tr 1227, Ex A28.* Typically when T.A. came home from high school he would call his mother at work (both parents worked full time) and talk with her for a little while. *Tr 1248.* T.A. did not drive or work. After school he spent most of his time doing school work.

(10) T.A.'s grades went down after seventh grade. His final grade point average was 2.00 at the end of 8th grade; 1.85 at the end of 9th grade; 1.64 at the end of 10th grade, and 1.38 at the end of the first semester of 11th grade. *Exs A2, B11.*[8] Nevertheless, he was progressing with his class from grade to grade.

aging affective interference; and utilizing working memory and accessing recall. *Tr 623-27.*

[8] His grade point average changed after the end of certain semesters due to credit recovery, *see* note 12, below, or, in the Fall 2002 semester, a grade of Incomplete which became an F because T.A. left FGHS without making up the missing work. *Ex A21.*

FGHS: 9th Grade

(11) Although T.A. had looked forward to high school, once he entered 9th grade (in September 2000) he was quickly overwhelmed. He became depressed and had big mood swings. His physician, Marilyn Booth, M.D., recommended that he see a therapist for counseling. *Ex A28.*

(12) In T.A.'s 9th grade year his parents observed that he was completely disorganized. He could not keep track of work done or whether he had turned in his work. He duplicated, lost or failed to turn in some of his assignments. He could not keep track of dates when assignments were due, tests were scheduled, or teachers were available after school. Ms. A. contacted T.A.'s teachers and collected work that had to be made up over Christmas break, which T.A. attempted with "extensive help" from his parents. *Ex A28.* In 9th grade T.A. spent 3-4 hours a night doing school work and additional time on weekends, due in part to the fact that he generally could not sit still for more than a few minutes without getting distracted. *Ex A28.*

(13) Jaime Vieth was T.A.'s teacher for freshman (9th grade) world studies. She had extensive e-mail contact with T.A.'s parents about what his current and future assignments were, to "keep T.A. on track and make sure that he was turning things in." *Tr 1319.* Also, Ms. A. met with Ms. Vieth more than once and talked about how T.A. was interested in history but could not do the work. Ms. A. told Ms. Vieth T.A.'s organization and study skills were poor, he couldn't keep track of anything, and he told Ms. A. he did not understand what was happening in class. *Tr 1348-1350.* T.A. failed the first three tests he took in Ms. Vieth's class but was allowed to retake them.

After intensive help with studying from Ms. A., who tried to teach T.A. how to read a textbook, he took the tests again and passed. *Tr 1348-49.* In the course of the year T.A. failed to turn in 11 of 34 assignments, and turned in five of the assignments as well as a major project late. Quiz, test and project grades were factored into his course grades in addition to credit for homework. *Tr 1327, 1332-33.* T.A. was doing better than probably a third of the students in the class in terms of missed assignments, and better than average in terms of late assignments. *Tr 1334.* Including T.A., approximately 80% of the students the first semester and 66% of the students the second semester passed the class. *Tr 1335.*

(14) Ms. A. also met with T.A.'s CCC (?) teacher to try to understand his assignments so she could help T.A. T.A.'s Spanish teacher allowed T.A. to draw a cartoon in Spanish so he could pass the course. Ms. A. worked with T.A.'s English teacher to try to get T.A. to complete his journal entries in class instead of trying to catch up every week or two at home. She also did a lot of reading out loud at home with T.A. to help him with his assignments. She brought T.A.'s science notebook to school a few times when he forgot it, and met with his science teacher to discuss the long-term project students were required to do. *Tr 1348-56.*

The 2001 Evaluation

(15) By December 2000, when T.A. was 15, he was behind in most of his classes and Ms. A. contacted T.A.'s school counselor, Laurel Kaufman "regarding concerns over the discrepancy in * * * what teachers said he was capable of, and what he was actually doing in school." *Ex 28.* Ms. Kaufman recommended referral for an evaluation for special education ser-

vices, *Ex A28,* and T.A.'s parents followed her advice. On December 31, 2000 Ms. Kaufman, *Tr 881,* filled out a Referral for Special Education form, which identified the following areas of concern: cognitive development/mental abilities; reading; written language; communication; and study skills. *Ex B1 at 1.* On the same date Ms. Kaufman, *MTr 63-64,* filled out a Parent Notification For Special Education Evaluation Referral form (Referral)[9] indicating that T.A. had been referred for a special education evaluation. The Referral was addressed to Ms. A. *Ex A1.*

(16) The Referral indicated T.A. had been experiencing the following difficulties in the classroom: missing assignments; not following verbal directions; talking; not following written directions; easily distracted; low test scores; does not do his work or turns in late work; short attention span; does not do much homework. The Referral also stated that the classroom teachers had tried the following to assist T.A.: sent to ISS (?); teacher has allowed late work without penalty; smaller classroom environment; one on one attention; meet with student after school to make up work; variety of testing styles;[10] spoken with parents about study strategies; moved T.A. to the front of the class; frequent check in to see what work is missing. *Ex A1,* Tr 1133-34. District staff notes for a Multidisciplinary Team (MDT) meeting on January 16, 2001 include, in the discussion of the Referral, "Maybe *ADD [attention deficit disorder]/ADHD*?"[11]

[9] The person who filled out this form was identified incorrectly (as Ms. Shofner) in the ruling on the Motion to Dismiss.

[10] A comment after this is illegible but might say, "all scores the same."

[11] *See* note 21, below.

MDT notes for February 13, 2001 relate, "Lorna will add medical state[ment] due to suspected ADHD." *Ex A12.* The District requested and eventually received a medical statement for T.A. It was signed by Janice Tsuchida, T.A.'s family nurse practitioner, and dated June 8, 2001. In response to a question about whether there were health conditions affecting T.A.'s educational performance, Ms. Tshuchida reported only that T.A. needed glasses. *Ex B1.*

(17) Lorna Shofner, a learning disability specialist at FGHS, was assigned to be the "case shepherd" for T.A.'s evaluation. *Tr 64.* Ms. A. told Ms. Shofner about T.A.'s elementary school years; how easily frustrated T.A. was; how he could not focus or complete work in class, and took a great deal of work home; how the parents had a lot of reports from T.A.'s teachers that he was unprepared for class and was completely disorganized; that she and Mr. A. were spending hours with T.A. helping with his school work; that T.A. had no study skills; that she was teaching T.A. how to read a textbook and take a test; how he could only recall information for a short time; and that he had research papers and projects due that had multiple components and he was unable to break them down and get started. *Tr 1201-02.*

(18) Pursuant to the Referral, in June 2001 T.A. was evaluated by Vinny Martin, FGHS school psychologist, to determine whether he had a learning disability. Mr. Martin reported the following background information/reason for referral:

> [T.A.] was seen for a psychological evaluation at his parent's request to determine the possible presence of a Learning Disability. [T.A.] has been seeing a community psychologist (Dr. Patchin) for "general adolescent issues," according to his

> mother. Apparently, [T.A.] can be "strong willed . . . sensitive to others . . . angry at times."[12]
>
> Review of school records indicated variable achievement with primarily Cs and Bs in grade 8. [T.A.] did not meet benchmark standards in Math, Reading and Literature in grade 8 state testing. Grade 9 grades deteriorated as the year progressed (3 Fs in 1st marking period of the second semester). Conversation with Mr. Wanner (applied pre-algebra teacher in lst sem.) indicated relatively good test scores with missing assignments pulling down [T.A.'s] grade.

Ex B1 at 10.

T.A. readily cooperated with Mr. Martin's evaluation and exerted good effort. Mr. Martin considered the test results valid and reliable. He observed that T.A.'s comments about his classes indicated he is aware that many of the difficulties he experiences are due to motivational factors. He said, "They're going all right, but I could be doing better . . . (How?) I could turn in all my work . . . I do it, but I don't hand it in (Why not?) If I understand it, I don't feel like going thru it all again (i.e. doing homework). . . . Sometimes, I don't do a couple and don't want to hand it in.[13]

[12] *See* Exhibit A11.

[13] Mr. Martin thought that in the last sentences T.A. was changing topics a little and responding to two different issues: number one, not doing the work; and number two, sometimes not handing it in because he didn't do it all. *Tr 1110-11.* He saw nothing in the way T.A. presented himself during the evaluation that led him to believe T.A. might have ADD. *Tr 1112-13.* Yet concerning he has identified as OHI due to ADD, he explained, "They'll sometimes, you know, lose a trend of thought, be ex-

Exs A2, A20.

Mr. Martin saw T.A. for one hour and one-half. *Tr 1122.* Reviewing the Referral during this hearing, Mr. Martin found nothing in the list of concerns on the form that would suggest that he should evaluate whether T.A. had a learning disability. He considered it "the default to look into a learning disability, it's usually the primary reason why students are referred." *Tr 1132-33.* In deciding how (for what) to evaluate T.A. he also considered the forms in Exhibits B1 (at 1) and B2a, and the guidance counselor may have presented additional information from T.A.'s teachers. *Tr 1134-36, 1139-40.*

(19) In high school T.A. received progress reports, with tentative grades, every six weeks, but the only grades that were counted toward his grade average were those on his report cards at the end of each semester. Commenting on his April 2001 progress report T.A. told Mr. Martin that his English class was "pretty easy" and he probably had a grade of F because he was missing work worth a lot of points. In Spanish (graded F) T.A. said he paid attention but it was hard to remember "a lot of stuff." He liked World Studies (graded C) a lot but it was harder to study for tests because there were specific things to remember. Science (graded F) had been going well but he didn't do well on a test because he didn't study as much or as long as he could have. In Applied Pre-Algebra (graded C) he understood the material for the most part. *Ex A20.* (At the end of that semester T.A. failed Pre-Algebra and English, received Ds in Science and

plaining something to you and then forget what it is after half a minute or 20 seconds, what the question was * * * ." *Tr 1113.*

Spanish, and maintained a C in World Studies.) *Ex A21, Tr 1107-1108, 1119.*

(20) When Mr. Martin questioned T.A. about the possible presence of "attentional deficits" T.A. said, "After a while I don't feel like listening to her (mother) any more or paying attention, but I don't think that's what it (ADD) really is . . . If it's not interesting to me or it's too hard, I just start thinking about something else." *Ex A2.* At that time T.A. could not yet admit that there was something different about his brain and the way he thought. That was a huge concern of his; he believed for some time that he could solve his own problems. He answered Mr. Martin "out of that framework of being embarrassed, of being ashamed, of not wanting to admit he was different." *Tr 688-89 (Testimony of Patchin).*

(21) Mr. Martin felt the difficulties indicated on the Referral (missing assignments, short attention span, easily distracted, etc.) did not reach the threshold to trigger an evaluation for ADHD issues. To reach that threshold he would have required "some evidence that some factors like [T.A.'s] volitional decisions to do work or not do work or pay attention or not pay attention were really not a factor." He thought T.A.'s actions were volitional at least in part because that is what T.A. told him. *Tr 1072-73.* According to Dr. Callum, a witness for the District (*see* Findings of Fact no. 127 *et seq*, below) if there was "maybe ADHD" that should have been addressed separately from the learning disability, with further evaluation. *Tr 851.* Based on the information in the Referral, if Dr. Neill, with whom the District contracted to evaluate T.A. (*see* Findings of Fact no. 104 *et seq*, below) were deciding how to evaluate T.A. she would have evaluated T.A. for

Other Health Impairment (OHI), emotional disturbance (ED) and a learning disability. If she had concerns about distractibility, following directions, focus, paying attention she would have screened for attention deficit. *Tr 993-94.*

(22) Mr. Martin did not interview T.A.'s parents or his regular education teachers as part of his evaluation. *Tr 1090, 1092.* Although T.A. was concerned that people would think less of him if they knew he had a problem, neither Mr. A. nor Ms. A. asked that T.A. not be evaluated for ADHD or depression. *Tr 1175.*

(23) As part of his evaluation Mr. Martin administered the Woodcock-Johnson Tests of Cognitive Abilities Third Edition (WJ-III) to T.A. He found T.A.'s verbal ability was in the high average range for his age, his thinking ability was in the average range, and his cognitive efficiency (automatic cognitive processing) was in the low range. He thought T.A.'s cognitive performance might have been influenced by his phonemic awareness (average) and working memory capacity (limited). He made the following comment about T.A.'s. social/emotional functioning:

> The purpose of this evaluation was not to provide an in-depth personality assessment. However, it appeared evident that motivational factors play a significant role in [T.A.'s] functioning. He appears to understand behavioral and academic expectation and make clear choices to either comply or not comply with those expectations. The reasons why are beyond the scope of this evaluation.

Ex A2 at 3.

On May 7, 2001 Mr. Martin wrote, in notes relating to T.A., "T not too sure what M[other?] means re: concern re: ADD." *Tr 1088.* He reported T.A.'s comment, above, about "attentional difficulties" and concluded, "Brief rev[iew] of results at end. Aver[age] abil[ity], no ADD." *Ex A11 at 2.*

(24) Ms. Shofner administered the Wechsler Individual Achievement Test to T.A. on May 1, 2001. T.A. scored in the 42nd percentile (grade equivalent (GE) 8.3) in basic reading; 27th percentile (GE 7.3) in math reasoning; 23rd percentile (GE 6.9) in spelling; 95th percentile (GE over 12.9) in reading comprehension; 4th percentile (GE 5.6) in numerical operations; and 55th percentile (GE 11.6) in written expression. *Ex B1.*

(25) As part of the evaluation Ms. Pappelis, Learning Specialist and Special Needs Coordinator, observed T.A. for 20 minutes in his art class and noted that he worked quietly and independently, and was appropriate. *Ex B1.*

(26) The evaluation results were considered, and T.A. was found not to have a learning disability and determined to be ineligible for special education, at an MDT meeting on June 13, 2001 at which Ms. A., Ms. Shofner, Mr. Martin and Ms. Pappelis were present. All four agreed with that determination. *Ex B1.* Considerations discussed at the meeting were possible tutoring for T.A. in math over the summer, credit recovery[14] or a tutorial in the Fall, and recon-

[14] "Credit recovery" is an opportunity for students who fail a class to take it over. *Tr 237.* If a student fails a class and then successfully completes credit recovery, the original F grade will change to NG ("no grade") on the transcript and the student will get credit for the passing grade resulting from credit recovery. *Tr 893-94.*

sideration of eligibility depending upon T.A.'s progress in the Fall. *Exs A2, A11, A28.* Ms. Shofner encouraged Ms. A. to take a "wait and see" approach, as in Ms. Shofner's experience many boys had similar problems but started "turning around" in their sophomore or junior years. *Ex A28.*

(27) Mr. Martin did not complete his evaluation report until September 2001. *Ex B3a.* A note from the MDT dated September 10, 2001 stated, "Sent report out to Parent. Not eligible LD [learning disabled] 6/13/01. Possible 504." *Ex A1.* Neither the District nor the FGHS staff took any action in response to the comment, "Possible 504." Ms. Pappelis thought that comment indicated the parent would have the option to rerefer T.A. to the counselor and provide the counselor with some sort of documentation regarding T.A.'s ADHD. She did not identify any procedures the school staff would follow in response to that information. *Tr 900-901.* Mr. Martin did not follow up on the reference to "possible 504." That was typically handled by the guidance counselor at FGHS, rather than the special education staff. *Tr 1098.*

(28) Ms. A. discussed the results of the evaluation with T.A. and told him the conclusion that the only thing he could qualify for possibly was a math disability. T.A. was pretty upset because he thought the evaluation might show why he was having so much difficulty in school. He concluded it must be his fault and he needed to try harder, and he really wanted to try, do well in school, and go to college. *Tr 1205.*

(29) On August 30, 2001 Ms. A. sent an e-mail to Ms. Shofner, Mr. Martin, Mr. Wanner (who was teaching a pre-algebra class T.A. had failed the

previous semester) and one other person, stating that T.A. had been in the District since kindergarten and still could not do the most basic math functions. She inquired whether there might be a more appropriate method of teaching for him, as he "apparently cannot process information or learn from the teaching methods used thus far." She said she would like to see some individual attention such as tutoring. *Ex B3a.* There was no evidence FGHS provided any assistance in response to this request.

(30) After T.A. was found not eligible for special education in June 2001 neither his parents nor any staff member at FGHS referred him for or requested a special education evaluation. *Exhibit B8a.* T.A. did not receive special education or related services from the District.

Notice of Procedural Safeguards

(31) At the bottom of the Referral which Ms. Kaufman prepared on December 31, 2000 was the statement, "Parents of a child with a disability have protection under the procedural safeguards which are enclosed. For assistance in understanding this information you may contact:" Betty Flick, Assistant Director of Student Services. Beneath that information the words "Enclosure: Procedural Safeguards" were printed. *Ex B1a.* The form was sent or given to Ms. A. Ms. A. did not inform the District that she had not received the Procedural Safeguards statement.

(32) Ms. Shofner sent Mr. and Ms. A. a Prior Notice About Evaluation form dated January 20, 2001, asking that they give written consent for the MDT to evaluate T.A.'s need for special education services. At the bottom of the form was the statement, "Parents of a child with a disability have

protection under the procedural safeguards which are enclosed. For assistance in understanding this information you may contact:" Betty Flick, Assistant Director of Student Services. Beneath that information the words "Enclosure: Procedural Safeguards" were printed. *Exhibit B2a.* Ms. Shofner was very meticulous about following procedures. *MTr 84 (Testimony of Flick).* Ms. A. consented to the evaluation by signing the form, on March 9, 2001. The form was received by the MDT on or about March 19, 2001. *MTr 66.* Neither Ms. A. nor Mr. A. informed the FGHS staff that they had not received the Procedural Safeguards statement. *MTr 68.*

(33) It is standard procedure at FGHS for the parental rights statement to be handed to the parent or parents at an eligibility meeting, usually at the very beginning of the meeting. *Testimony of Pappelis, MTr 69, 74.* It is Ms. Pappelis' practice to give parents a copy of the parental rights brochure, with procedural safeguards, at the time the school seeks permission to evaluate and again at the eligibility meeting. She had no reason to believe she varied from this standard practice with regard to the meetings convened with T.A.'s parents, including the MDT eligibility meeting on June 13, 2001. *Exhibit B11a.* It was Ms. Shofner's standard practice to hand parents a copy of their parental rights at eligibility meetings, and she believed she always did that. *MTr 181.* Ms. A. did not recall receiving the parental rights statement at the meeting on June 13, 2001 nor did she have a copy of it in the folder where she kept information about T.A.'s high school education. *Tr 99.*

(34) The Notice of Procedural Safeguards (Notice) distributed by the District in the 2000-2001 school

year had the same information as the current Notice booklet concerning when reimbursement for private school education can be reduced or denied. *MTr 80 (Testimony of Flick).*

(35) Between December 31, 2000 and June 13, 2001 the District sent or gave Mr. and Ms. A. at least one copy of the Notice. *See Ex B16a, Ruling on Motion to Dismiss.* The Notice gave the following advice about reimbursement for parental placements:

> *When Reimbursement May Be Required.* A court or hearing officer may require a school district to reimburse parents for the cost of private school placement made without the consent of or referral by the school district only if:
>
> - the child received special education and related services under the authority of a public agency before enrolling in the private school;
> - the court or hearing officer finds that at that time the school district did not make a free appropriate public education available to the child in a timely manner; and
> - parent provided notice removing the child from public school.
> - The court or hearing officer may reduce or deny reimbursement if the parents did not inform the school district that they were rejecting the placement proposed by the school district and state their concerns and their intent to enroll their child in a private school at public expense. This notice must be given either:

- at the most recent IEP meeting that the parents attended before removing the child from public school; or
- in writing to the school district at least ten business days before removing the child from public school.

- A court or hearing officer may not reduce or deny reimbursement if a parent does not give this notice if:
  - * * * *
  - the parent had not receive a copy of this *Notice of Procedural Safeguards* or otherwise been informed of this notice requirement * * * .

Ex B16a at 21-22 (bold face emphasis added).

(36) The Notice distributed in 2002 explained that parents had the right to an independent educational evaluation at public expense if they disagreed with the evaluation that the District provided, unless the District requested a due process hearing to show that its evaluation was appropriate. The Notice stated, "If you request an independent evaluation, it is important to clearly inform the district about your request." *Ex B16a at 8.* Whether this language appeared in the Notice distributed in 2000 and 2001 is unknown. *See MTr 80.*

FGHS: 10th grade

(37) T.A. began 10th grade in September 2001. In math, T.A.'s first progress report showed he was not turning in work and failing tests. Ms. A. contacted Mr. Martin, who said T.A. could be referred for an evaluation again ("for consideration of a learning disability and special ed services") but it would be

difficult to find him eligible. *Exs A28, B3a.* T.A. was in a credit recovery class to make up a 9th grade English credit. *Ex A28.*[15] It took T.A. 28 weeks to complete his missing credit, as compared to an average of eight to 10 weeks for other students. The credit recovery teacher advised Mr. and Ms. A. not to send T.A. to summer school because there, as in credit recovery, students work at their own pace. *Ex A28.*

(38) T.A.'s six week progress report also indicated he was failing most of his classes. *Tr 510.* Because T.A. was having so much difficulty, in November 2001 Mr. and Ms. A. hired T.A.'s older sister, A.A. (who was home from college for a year), to tutor him 10 hours per week (two hours per day on three week days and four hours on the weekends). *Tr 501-03.* The parents asked A.A. to tutor her brother because T.A. was very resistant to working with a stranger (a tutor he didn't know) and Ms. A. was too exhausted to continue providing all of the help T.A. needed. Ms. A. continued to help T.A. with his biology and English and A.A. did the rest. *Tr 1197.* A.A. made a contract with T.A. under which he agreed to keep track of his assignments, talk to his teachers and know what he had to do, and come to their tutoring sessions prepared and willing to work. A.A. agreed to keep in touch with T.A.'s teachers so she would also know what T.A. was supposed to do. A.A. tutored T.A. until February 2002. She ended the contract because T.A. was breaking it. But at her mother's request she continued to tutor T.A. in math and Spanish, for around six hours each week, until April

[15] T.A. failed 9th grade English but after credit recovery passed the class and got credit for it in his sophomore year. *Ex A21.*

2002. *Tr 502-06.* A.A.'s main function was helping T.A. with his homework by keeping him focused. Sometimes she could maintain his attention by having him talk about what he was doing. Sometimes she taught T.A. material he did not understand. Among other tasks T.A. worked with A.A. on completing work sheets he should have finished in class. A.A. saw that T.A. sometimes could not rearrange information in his head. He had to write things on paper, tear the paper apart, and physically reorganize the information. *Tr 508-09.* A.A. thought T.A. was learning better one on one with her than he was in the classroom, as long as he tried to follow their contract. *Tr 510.*

(39) When A.A. began working with T.A. he was far behind in his school work, and they mainly did makeup work. By the 12th week of school T.A.'s intermediate grades had greatly improved. *Tr 510.* T.A. was really happy and proud of himself. *Tr 515.* But thereafter T.A. stopped following the contract and became disorganized, he fell behind and his grades went down again. *Tr 510.*

(40) Mr. or Ms. A. contacted Ms. Kaufman, the counselor, about T.A.'s difficulties again and she suggested they talk with the FGHS Options counselor, Gordon Garlock. Mr. A. and T.A. met with Mr. Garlock asking for help with T.A.'s continued poor school performance, desire to do well, and frustrations. Mr. Garlock recommended that T.A. look into the Portland Community College (PCC) Partnership Program.[16] He also suggested taking T.A. out of his

[16] The FGHS/PCC Partnership Program enables FGHS students to earn credit at PCC toward high school graduation, with FGHS paying part of the cost. *MTr 22.*

Career Ed class and letting him spend the time in Biology, making up work in that class so he would not fail in the second term (as he had in the first). This was accomplished. *Ex A28.*

(41) T.A. dropped the Career Ed class, *Ex 28,* and he and Ms. A. met with Ms. Garcia, T.A.'s Biology teacher, and arranged for T.A. to make up labs and tests during the free period. With this opportunity and help from his parents, T.A. passed Biology with a C. T.A.'s English teacher called Ms. A. more than once to discuss T.A.'s lack of progress and his concerns that T.A. did not do his work in school. Ms. A. went to school and got a project from the teacher which she helped T.A. complete over Christmas break. In history Mr. A. helped T.A. go over the class work and how to read the textbook. T.A. and Ms. A. met with the teacher because T.A. was not doing the work or passing his tests. The teacher told them of opportunities for T.A. to retake the tests. Ms. A. had a lot of contact with T.A.'s pre-algebra teacher to help ensure that T.A. turned in his homework and to find out what he needed to be studying to pass the next test or a retest. *Tr 1263-68, 1356-60.* At the end of the second semester T.A. earned a C in Math with four hours of tutoring weekly, and Ds in English, American Studies and Spanish. In art classes his grade were [sic] A and B. *Ex A28.*

(42) In a journal entry which T.A. prepared for his English teacher in Fall 2001 he wrote,

> Sometimes i really get mad at myself for stuff that I do, but mostly stuff that i don't do. Like turning my work in. Studying for tests. I try so much to do good in school, last year they even gave me all these tests and everything to see if I have a learning disability, but they said I don't. I

> guess its just stubbornness. i really think I'm smart enough to be in all the advanced classes, theres just no way I could get myself to do my homework.

On February 20, 2002 he wrote:

> Last night i read about the chaos theory, the superstring theory, T.S. Eliot, Einstein, Newton, art history and all kinds of stuff, in some books i found. I am so interested in all this stuff, but i do so horrible in school you'd never guess it.

Ex A25.

(43) When T.A. was tested in eighth and tenth grades, his composite scores did not meet the State benchmarks for math or reading and literature. *Tr 1062-63.*

FGHS: 11th Grade

(44) T.A. began 11th grade in Fall 2002 determined to do better. *Ex A28.* His parents believed that, after the previous summer, when he acknowledged he had been trying marijuana, he really wanted to change things. *Tr 1157.* His first progress report was his best at FGHS, with four As, two Bs and one C/D. Although he had been becoming more and more reclusive, he began to take guitar lessons from his uncle and joined a choir and the yearbook staff. By November, however, his progress report indicated he was not turning in work and was falling behind in school. He was having angry outbursts and big mood swings at home again. He dropped the choir and the guitar lessons. *Ex A28, Tr 1160.* He was again using marijuana, with increasing frequency. *See* Findings of Fact no. 52 *et seq, below.* His teachers recorded a number of "tardies" and missed classes from September 2002 to February 2003. *Ex B4.* In the Fall

2002 semester, other than helping T.A. keep track of his assignments and making sure he was doing homework, Mr. and Ms. A. did not provide much help to him. *Tr 1363.* T.A. had much less homework than he had had in the past, and the assignments were not lengthy. *Tr 1363.* Also, he could receive help with math after school (from his teacher or her assistant) three times a week. *See* Finding of Fact *no. 47, below.*

(45) Lee O'Banion was T.A.'s English teacher in Fall 2002. When Mr. O'Banion called on T.A. during class discussions, or to read his part in a play, T.A. was always ready to respond. Mr. O'Banion never had any concerns about T.A. being "on task." T.A. never had any behavior problems and always knew what to do in class. *Tr 481-84.*

(46) In Fall 2002 T.A. wrote in his journal for Mr. O'Banion:

> I feel a lot of stress every day, more than a lot of other people probably. I don't know why, but I just stress over small stuff. * * * I should be happy, it's Friday, but all I can think about is how much homework I have. I don't have big stressed out days every now and then but it's more like the entire school year is one big long stressful time for me, and I don't have the endurance sometimes to keep my grades up. I don't know how my friends find time for everything they do, and have a lot of free time.

Ex A25. Mr. O'Banion did not consider these sentiments unusual for a high school student, *Tr 497-99,* nor did the assistant principal at FGHS, Ms. Voigt. *Tr 251-52.* T.A. also commented, in a journal entry on September 25, 2002, that the students he

hung out with at school, whom he had met about three years earlier, weren't really his friends. *Ex A25.*

(47) Shelly Reikofski taught T.A.'s Algebra 1 class in Fall 2002. T.A. had done a lot of the same work in his pre-algebra class, at a little bit lower level, and on occasion he told Ms. Reikofski he had done the same kinds of problems before. *Tr 156.* T.A. had a grade average of 76 and received a C (70-79%) in Algebra 1 based on his test scores, homework, quizzes, projects and class participation. *Tr 138-39.* T.A. began well in that class, turning in all of his assignments on time in the first six week period. In the second six week period three of his six assignments were late (for which he got half credit). Thereafter T.A. started missing assignments, so Ms. Reikofski arranged for T.A to come to after school help sessions with her or a college student on Mondays, Tuesdays and Thursdays from 2:45 (when school ended) until 4:30 or 5 p.m. By end of the course T.A. failed to submit three assignments, submitted 11 late (including three he did not turn in when due in class, but completed later in the after school program and for which Ms. Reikofski gave him as she did others full credit), and submitted 15 when due. *Tr 141-44, 149-50.* During that semester T.A. turned in one math test paper blank, and when Ms. Reikofski gave him a retest after reviewing the material with T.A. in school, he scored 58. After school tutoring, allowing retests, and accepting late work were accommodations Ms. Reikofski offered to all of her students. *Tr 147-48.* T.A. was compliant and well-behaved in Ms. Reikofski's class. *Tr 151-54.*

(48) Ron Thompson taught in the District for 17 years before he retired in June 2003. In Fall 2002 T.A. was in Mr. Thompson's class in U.S. History.

Students would pass the class if they were present every day and handed in all of the work. Students who, in addition, did pretty well on the test would probably get a B, which was T.A.'s grade in the class. *Tr 181-84.* A lot of the assignments were done in class. *Tr 186.* T.A. got his work done and was aware of what was going on when Mr. Thompson asked him questions during class. *Tr 186-87.* Mr. Thompson thought T.A. liked history, and Mr. Thompson did different things in each class period and tried to make the class fun. *Tr 190-91.* His class was well-organized with short, well defined and entertaining projects, rather than lengthy assignments T.A. would have to work on at home for weeks. The subject, 20th century American history, was especially interesting for T.A., who enjoyed reading his grandfather's diary about his combat experiences in World War II. There was very little reading outside class. *Tr 1059-60.* Mr. Thompson provided study guides for the students and outlined what they needed to be aware of, which helped them be prepared for tests. *Tr 1050-51.* T.A. was quiet and had no behavior problems. *Tr 186-87.* Mr. Thompson did not think T.A. was wandering (mentally) or daydreaming in class any more than anybody else. *Tr 189.*

(49) In Fall 2002 Ms. A. had two conversations with T.A.'s Spanish teacher, Ms. Gabriel. Ms. Gabriel reported that T.A. had failed his test and needed to retake it, and that he failed to turn in his assignments or turned them in late. Ms. A. did not help T.A. with his Spanish assignments but kept reminding him to work on his homework, asking him if he had finished, and inquiring about whether he had turned it in. *Tr 1250.*

(50) T.A. is talented in art. He took five different art classes at FGHS in his freshman and sophomore years with Philip Thias and got grades of A and B. He was in two classes with Mr. Thias in the first semester of the 2002-03 (junior) school year independent study and advanced placement art, a college level course. Both courses were only open to students who had taken prerequisites and had the consent of Mr. Thias, and were for very serious minded, able students. T.A. did the independent study in a classroom where Mr. Thias was teaching 40 students in a basic design class. T.A. was easily distracted during that time. The other students' work was unrelated to his independent study. Ultimately T.A. received grades of "incomplete" in both courses. *Tr 454-5.* Until the Fall 2002 semester T.A. had always managed to finish his work in Mr. Thias' classes, although it was a challenge for him. *Tr 460-61.* But in Fall 2002 Mr. Thias found that T.A. was not as motivated as he had been in the past, and it was much more difficult to "just sort of get him rolling along." *Tr 459.* Mr. Thias felt T.A. had some problems with organization and procrastination. *Tr 462.* Mr. Thias became concerned about whether T.A. was involved with drugs, and reported this to Mr. A. in February 2003. *Tr 470-71, Ex A28.*

(51) In January 2003 Mr. A. and T.A. arranged with Mr. Garlock that T.A. would apply to the PCC Partnership Program in the hope that he could finish his high school requirements at PCC. On February 28, 2003 Mr. A. informed Mr. Garlock that T.A. was enrolled at PCC, had completed his placement tests and had met with an advisor. On March 3, 2003 Mr. Garlock responded that the District could place T.A. in the Partnership Program for the Spring term (beginning in April 2003). *Exhibit B12a.*

Behavior Problems and Substance Abuse

(52) T.A. behaved appropriately in high school, except that on one occasion (September 2001) he brought a butterfly knife to school. He did not display it or threaten anyone with it. He was suspended for three days. He said he had the knife to protect himself because he was going to Portland, but in fact he never went to Portland alone, and only once went there with another young person (his cousin). *Tr 1164.*

(53) When T.A. was 15 he secretly drank some champagne at a cousin's wedding. *Tr 1146.* At age 15 or 16 he also drank some Scotch his parents had, and he tried cocaine once. *Tr 1274-75.* T.A. began using marijuana sporadically early in the winter of 2002. *Ex B6, Tr 1147.* When he had it he used it, and when it was all gone he would abstain for weeks or months. *Tr 1147.* He used marijuana in the summer of 2002, on a camping trip with his cousins. *Tr 1163.* Although T.A. knew this wasn't a good idea for him, no later than November 2002 he was using marijuana again. Ms. A. was concerned that Fall that T.A. might be using marijuana again, but was more concerned that T.A. was very depressed and was getting behind in school again. *Tr 1252.* Eventually T.A. admitted to Ms. A. that he was using marijuana again. *Tr 1256-57.* He considered it a way of dealing with his depression, as it helped improve his "empty" and "melancholy" mood temporarily. *Ex 19 at 3.* T.A.'s family went to Alaska for Christmas and T.A.'s parents returned before T.A. did. Mr. A. found drug paraphernalia in T.A.'s room. T.A. said he had left it there for his parents to find because he was overwhelmed and needed help. *Tr 1165-66.* But T.A. continued to use marijuana until February 2003, and

during that time his use escalated. He had a binge in January or February 2003. At times T.A. was using marijuana three or four times daily, sometimes before going to school; if he was home alone after school; or late at night. *Tr 1148, 1165-66, Ex B6 at 7.* At the time of the binge T.A. was sometimes notably incapacitated, and he began staying out late after school. *Tr 1165, Exs A19, A28.*

(54) A new semester at FGHS began around February 3, 2003. *Tr 209.* T.A. ran away from home on Tuesday, February 11, 2003, *Tr 206,* and stayed overnight at a friend's house. He was picked up by the police and returned home on February 14. He confessed to his parents that he had been using marijuana on a fairly regular basis. He had last used marijuana on Tuesday before he ran away. In the weeks before he ran away T.A. had been very "spacey" and reclusive. On some days he was so drugged he could not get out of bed or speak. He had made over $1000 worth of telephone calls to sex talk lines (which he accessed by spelling words on the computer keypad), and had scanned Internet pornography sites before his parents removed the computer from the home. *Exs A18, B8, Tr 1145-46, 1162-63, 1273.*

(55) When T.A. returned home on February 14, 2003 his parents brought him to see his therapist, Dr. Patchin. T.A. refused to stop using marijuana, control his angry outbursts, or comply with his parents' wishes. Mr. and Ms. A. then brought T.A. to a hospital emergency room, where he was evaluated and discharged to his parents' care. *Exs A18, A28.* Dr. Patchin noted, "[Ms. A.] does not feel safe bringing [T.A.] home and supervising him without additional supports." *Ex A18.* Ms. A. thought there was some-

thing very wrong with T.A., and that she and Mr. A. could not help him. She feared he might harm himself. *Tr 1273.*

Leaving FGHS

(56) On Thursday, February 27, 2003 Mr. A. called Sue Voigt, an assistant principal at FGHS, and informed her that T.A. was undergoing medical testing, would enter a three week wilderness training program on "Sunday," and would be attending PCC in the Spring. T.A. would not be returning to FGHS. *Ex A3, Tr 206, 1304.* On February 27, 2003 Ms. Tsuchida, NP, faxed a note to Ms. Voigt stating that T. A. was currently in treatment for "medical & psych problems" which would necessitate an extended absence from school from February 12 to March 31, 2003. *Ex B6a.*

(57) On March 10, 2003 Mr. A. told Ms. Voigt that T.A. was registered at PCC (as previously arranged through Mr. Garlock), and T.A. was officially disenrolled from FGHS. *Tr 208, Exs A3, B9a.* Mr. A. never informed Ms. Voigt that he was dissatisfied with the District's planned placement of T.A. at PCC, and Ms. Voigt believed at the beginning of the Spring quarter (April 2003) that T.A. was attending PCC in the Partnership Program. *MTr 50-51, 150-51.* On April 1, 2003 Mr. Garlock enrolled T.A. (with several other students) at the District's Ellen Stevens Community Academy, meaning that he was enrolled in the District but not in the high school. *MTr 32.* Had T.A. remained at FGHS or gone to PCC, he would have been able to graduate on time, in June 2004. *Tr 219-20.*

(58) T.A. entered the Catherine Freer Wilderness Therapy Expeditions residential treatment program

(Freer) on March 2, 2003. His parents anticipated that he would return home after the three week program ended and begin school at PCC. *Ex A19.* He was admitted to Freer due to substance abuse and oppositional behavior, following his marijuana binge and running away from home. *Ex B8.* On March 22, 2003 Mr. and Ms. A. picked up T.A. from the Freer Wilderness Trek and on March 24, 2003 they enrolled him by telephone in a residential program at Mt. Bachelor Academy (MBA). *See Finding of Fact no. 89.* The next day they took T.A. to Prineville, Oregon to begin attending MBA. *MTr 141.*

(59) On March 24, 2003 Mr. A. left a voicemail message for Mr. Garlock. He wanted Mr. Garlock to know that T.A.'s PCC slot was available because T.A. was enrolled in a therapeutic boarding school. Mr. Garlock did not receive this message. *MTr 39.* For the same reason, on March 27, 2003 Mr. A. left two voicemail messages for Bob Sorrell, District Options program director, asking him to call back and saying it was very important. Mr. A. did not receive replies to these calls, which were made during Spring break at FGHS. *MTr 151.*

(60) Mr. Garlock first learned that T.A. was not attending PCC in a conversation with Ms. Flick in April 2003, several weeks after the spring term began at FGHS. *MTr 34-35.* He then (on April 21, 2003) disenrolled T.A. from the PCC Partnership Program. *MTr 35.*

(61) On March 28, 2003 Mr. A. hired counsel to find out what the parents' rights were, and to notify the District in writing of what the parents were doing. *MTr 141-142.* Mr. A. (and presumably Ms. A. as well) was not aware, before placing T.A. at MBA., that the school District could be responsible

for paying the costs of sending T.A. to Freer and MBA. *MTr 144.*

Dr. Patchin

(62) Dr. Susan Patchin has been a licensed psychologist in Oregon since 1995. She received her Bachelor's degree in education and science and her Master's degree and Doctorate (Psy.D. in 1993) in psychology. *Ex A18.* She also has a postdoctoral Master's in clinical psychopharmacology. *Tr 604.* She spends 100 hours or more each year in continuing education studies. *Tr 604-05.* Her practice includes assessment and diagnosis of attention disorders, learning and academic disorders, and treatment of school age children, adolescents and adults. She has been an adjunct faculty member at Pacific University, George Fox University and Warner Pacific College and since 1998 has supervised Master's and Doctoral level interns and residents seeking licensure in the state of Oregon. *Ex A18.* She does contract work for school districts, and over the past five or six years has done approximately 50 parts of evaluations (the IQ test, the behavior survey, participating in the team, etc.) for the District. She also does disability assessments for Lewis and Clark College. *Tr 604-07.* From 1982-1993 she was a teacher or substitute teacher. *Ex A18.*

(63) Dr. Patchin began seeing T.A. and his parents in April 2000 and has since seen one or more of them approximately 16 times, including 12 hours with T.A. alone. Initially the parents explained that T.A. was having a lot of problems in school and had a history of some anger difficulties. Dr. Patchin has never observed T.A. in school or spoken to any of his teachers about him. *Tr 612-14, 723.* T.A. acknowledged to Dr. Patchin that he had trouble in school,

especially with homework and staying focused, but he did not think he had a learning disability or ADHD; he believed that if he just applied himself he could do what was required. Dr. Patchin observed, on May 3, 2000, that T.A. appeared to be underestimating his struggles with school and planned to evaluate T.A. for patterns of learning disability (LD) or ADHD. She gave him a diagnosis of Major Depressive Disorder, moderate, single episode. *Ex A18.* T.A.'s difficulties with his schoolwork were a recurring theme in his therapy.

(64) On November 14, 2000 T.A. reported to Dr. Patchin he "did okay" at the end of the school year, and that he wanted to do better but found himself unable to get motivated to start a task and see it through to completion. He was feeling more depressed. Dr. Patchin noted that T.A. needed to be further evaluated for antidepressant therapy and/or LD or ADHD. *Ex A18.*[17] T.A.'s parents did not follow this recommendation immediately. Among other reasons, there were financial considerations and they wanted to see what evaluations and services the District could provide. *Tr 617-18.*

(65) Dr. Patchin administered the Behavior Assessment Scale for Children (BASC) to T.A. and his parents in December 2000. *Ex A118.* The BASC is designed to evaluate parent, teacher and self-perceptions of emotional/behavioral functioning of children aged 4 to 18 years. *Ex A17 at 6.* T.A. scored himself in the average range in all of the scales. His mother scored him in the clinical range for

[17] Dr. Patchin always referred a client to an outside evaluator, rather than conducting the evaluation, when she was doing therapy with the client and his/her family. *Tr 616, 649.*

hyperactivity, depression, withdrawal and attention problems. His father scored him in the clinical range for attention problems. On December 19, 2000 Dr. Patchin diagnosed dysthymia. *Ex A18.* Dr. Patchin reported that as hard as T.A. was trying he was unable to work at a pace that fit his intelligence, estimated to be average, and that mood and focus were big factors. In January 2001 T.A. told Dr. Patchin that he anticipated receiving passing grades, having done a lot of make-up work to finish the semester. He complained that he hated school and it made him feel dumb. *Ex A18.*

(66) In March 2002 Dr. Patchin administered the Minnesota Multiphasic Personality Inventory Adolescent version (MMPI-A) to T.A., as his behaviors continued to increase in severity as did his school failure. T.A. obtained scores in the average range on all the clinical scales of the MMPI-A. *Ex A18.*

(67) Dr. Patchin observed that a lot of T.A.'s issues surrounded feeling really stupid and believing what people were telling him, which is that if he would just be a little more motivated and stop being so lazy he could get his work done. *Tr 620.* In April 2002 T.A. told Dr. Patchin he was feeling frustrated that he could not "pull it together" long enough to get his work done at school. He was taking Wellbutrin and began to have emotional outbursts at home again, with yelling, crying and sobbing for hours at a time. These spells were often precipitated by his lack of follow through on schoolwork, missing assignments, and getting failing grades. T.A. told Dr. Patchin he couldn't stand how badly school made him feel any more. In May 2002 he had a serious outburst at home aimed at Ms. A. He said about school, "I tried less and less hard because I just can't do it right. I don't

learn from the work or by staying after school." Dr. Patchin referred T.A. for a psychiatric evaluation in May 2002 but this was not pursued because of problems with insurance coverage. Also, cost was a concern for T.A.'s parents. *Tr 771.* In addition, T.A. repeatedly assured his parents he would do better in the future, and they believed him. *See Tr 777-78.*

(68) In January 2003 T.A. told Dr. Patchin that focus had become a big issue for him in school and at home. *Ex A18.* T.A. could not sit down and focus to read an assignment, and he would get extremely frustrated. This was one manifestation of his impairment in executive function. Another was his difficulty initiating any action that he had any kind of anxiety about or that he found to be difficult. *Tr 624-26.*

(69) Dr. Patchin recommended (at the hearing) that at school T.A. have an opportunity, three times a day, to check in with a guidance counselor, teacher or another school staff person who would help him keep track of his assignments and make sure that things he needed to do were done and that appropriate materials were in his backpack. Although T.A. was receiving grades which allowed him to pass from one year of school to the next, Dr. Patchin thought this level of assistance was necessary because in high school T.A. was becoming more and more discouraged, less able to tolerate frustration, and was giving up more easily. At one point T.A.'s parents stopped helping T.A. with his school work but after about a week, although he was making a tremendous effort, he became so overwhelmed by his school work that he could not figure out how to start any more, so his parents intervened again. *Tr 636-38, 774-75.* Dr. Patchin opined that if the parents had not intervened the things that happened substance abuse, unusual

behaviors, running away would have happened with more intensity and more quickly; and T.A. would have gotten more grades of D and F. *Tr 775-77.* In Dr. Patchin's view T.A. was not an average student who could go to school and pass his classes. For T.A. to achieve passing grades required tremendous effort on his part and the part of his family, and many concessions by his teachers. *Tr 750-51.*

(70) Dr. Patchin's chart notes were submitted to the District in response to a subpoena on September 19, 2003. They were not available to the MDT before or during the IDEA and Section 504 eligibility meetings in July and August 2003. *Tr 29-32.* The District received a one-page letter prepared by Dr. Patchin. *Tr 106-107.* That letter, dated May 3, 2003, *Ex A18 at 7,* was written at the request of T.A.'s parents, with restrictions on the information Dr. Patchin could release.[18] T.A. wanted help but he did not want the school personnel to delve into his emotional life. *Tr 642.*

(71) Dr. Patchin thought T.A. would benefit from coaching; having a card with the multiplication tables written on it that he could use when solving problems so he did not have to depend upon his memory; possibly having a study buddy or note taker in the classroom, with whom he could compare notes (to see if he had missed pertinent facts); being in a study group where other students would be repeating the main points of the lessons; and having as many of his senses involved in his education as possible (seeing, hearing, writing, speaking). *Tr 694-95.* She thought it would be hard for T.A. to remain focused in a block

[18] T.A.'s parents had asked Dr. Patchin not to have contact with FGHS. *Tr 729-30.*

class lasting around 90 minutes (a typical class at FGHS), and that breaking the material into smaller chunks so he would not have to sit and do one kind of activity for a really long time would be helpful (as well varying the classroom activities and possibly giving him an outline he could fill in; or giving him the overheads for the class presentations). *Tr 699-700.* Dr. Patchin thought T.A. probably needed one on one remedial instruction in math and possibly reading comprehension and writing, and instruction in time management and organizational skills. *Tr 701-702.*

(72) Due to his ADHD T.A. needs to be taught how to identify the significant information in a text. He needs to be given instructions one or two steps at a time. He needs to be taught strategies for time management because, like many persons suffering from ADHD, he has not mastered the concept of time and the ability to realistically estimate the time required for an activity. *Tr 704-05, 782.*

Dr. Fulop

(73) Dr. Michael Fulop is a clinical psychologist with a Master's degree in counseling psychology (1988) and a doctorate in psychology (Psy.D.) awarded in 1991. Since receiving his degree he has mainly worked in private practice, involving treatment and assessment of children, adolescents and some young adults and adults. *Tr 271-72, Ex B5.*

(74) Dr. Patchin referred T.A. to Dr. Fulop for an evaluation for emotional and learning disorders, ADHD and depression. *Tr 280.* Dr. Fulop saw T.A. and his parents for an initial diagnostic interview on January 27, 2003. He spent about four hours on February 21 and four hours on February 24, 2003

testing T.A. *Tr 916-18.*[19] He then drafted his report, saw the parents on March 14, 2003 to discuss his evaluation, possibly made some changes to the draft report, and issued the report on March 15, 2003. *Tr 918.*

(75) As part of the evaluation Dr. Fulop had T.A. and his parents complete BASC rating scales. As when Dr. Patchin administered the BASCs, T.A.'s did not reflect any concerns of clinical significance but his parents' did. Ms. A. gave T.A. clinically significant scores for hyperactivity, conduct problems, depression, attention problems, atypicality, withdrawal, externalizing and internalizing. Mr. A. gave T.A. clinically significant scores for hyperactivity, attention problems, withdrawal and externalizing. *Ex B5 at 7.* Such discrepancies between children and their parents were quite common among Dr. Fulop's patients. *Tr 381, 936.* Dr. Fulop typically sent BASC forms to a student's school but did not do so in this case. *Tr 281.* When he received BASCs from teachers some might show problems in school and some might not, possibly due to the relative difficulty of the subject for the student. For example, students with ADHD, might have more difficulty in math or a foreign language, where they have to pay attention or use working memory. *Tr 939.* Dr. Fulop felt he had sufficient information to evaluate T.A. without direct information from T.A.'s teachers. *Tr 318.* In addition

[19] T.A. told Freer on March 2, 2003 that he had last used marijuana 10 days earlier—which would have been just before his evaluation by Dr. Fulop. *See Tr 932, Ex B8.* Dr. Fulop saw T.A. early in the morning on the evaluation days. He did not suspect T.A. was under the influence of marijuana. If he had suspected that he would have suspended the testing. *Tr 957.* Dr. Fulop was formerly an alcohol and drug counselor. *Tr 960.*

to the information Dr. Fulop received about T.A.'s education from T.A. and his parents, the parents provided him with all of T.A.'s school records (that they had), including his transcript and report cards. *Tr 920-21.*[20]

(76) Dr. Fulop gave T.A. diagnoses of ADHD, combined subtype[21] and a dysthymic disorder, a form of depression with relatively long term symptoms such as sadness, pessimism, very little motivation at times, not a lot of excitement, and often tiredness and feelings of guilt. *Tr 286.* Concerning hyperactivity, Dr. Fulop reported that T.A. was constantly moving his hands and feet, but very subtly. *Tr 292.* Dr. Fulop also observed that T.A. exhibited lack of motivation, lack of social interaction and paucity of speech, and felt bad about himself. *Tr 288.* On IQ testing Dr. Fulop found that T.A.'s full scale IQ score (102) on

[20] Although the District, in its Post-Hearing Brief, attempted to discredit Dr. Fulop's evaluation, *District's Post-Hearing Brief at 20, note 1 and 26,* Dr. Neill, the District's witness and evaluator, described Dr. Fulop's evaluation as "very, very, very comprehensive," *Tr 63.* In addition the District stated in its Pre-Hearing Brief that "[B]ecause Dr. Fulop had done such a comprehensive work-up within the last six months, and since none of the parties disputed the validity of Dr. Fulop's results, there was no need [for Dr. Neill] to conduct additional formal assessments." *District's Pre-Hearing Brief at 4, n.1.*

[21] Under the previous version of the *Diagnostic and Statistical Manual of Mental Disorders, DSM III*, ADHD and ADD were listed separately. Under the current version, *DSM IV*, ADHD is the "main disorder" and there are three subtypes inattentive, hyperactive, and combined. *Tr 272-73.* The main elements are attention problems, hyperactivity at times, motivational problems, and difficulty with executive functioning (including planing of any type). *Tr 273.* Substance abuse and depression are comorbid disorders which occur more frequently among the ADHD than the general population. *Tr 278.*

the Wechsler Adult Intelligence Scale (WAIS-III) was probably pretty accurate.[22] It was significant that there was a 24 point discrepancy between T.A.'s IQ score and his "working memory" score, indicating that T.A.'s ability to attend to auditorily presented nonmeaningful information was quite poor. *Tr 293-95.* T.A. told Dr. Fulop that it was difficult for him to do his homework because, although he wanted to do it in some ways, he did not seem to be able to get started very effectively. *Tr 301.* On testing T.A. exhibited difficulties with executive functioning. Such difficulties may result in students not bringing their homework home, bringing the wrong homework home, failing to bring home books necessary to complete homework, failing to remember the homework assignment, or failing to turn in completed homework. *Tr 306-07.* Dr. Fulop's impression was that unless T.A.'s parents compensated for T.A. [sic] difficulties with executive functioning by "kind of [functioning] * * * as the frontal lobes," T.A. would not do his school work at home. *Tr 317-18.*

(77) Dr. Fulop found that T.A. had learning problems with auditory memory, auditory discrimination, expressive language, organization, and combinations of the foregoing. He identified T.A.'s academic functional limitations as: reading speed; timed tests; spells poorly; confusion with number sequencing (hearing 233 instead of 332); difficulty with equations; difficulty expressing himself, very slow in speech; organization skills; incomplete work, incomplete assignments; unorganized note taking; cannot use outline; poor recall of material. *Ex B5.* Dr. Fulop gave T.A. additional diagnoses of math disorder and

[22] T.A.'s IQ scores were within the average range of intellectual functioning. *Ex B5.*

cannabis abuse.[23] He also noted dependency features. *Ex B5.*

(78) Children with ADHD may be able to concentrate for long periods of time on activities they find interesting and stimulating but find it much harder to pay attention when engaged in activities they consider dull, rote and boring. *Tr 275-77 (Testimony of Fulop).* They often have difficulty motivating themselves because they cannot anticipate the future and they cannot anticipate social consequences. *Tr 273.*

(79) Dr. Fulop referred T.A. to a physician for medication management to aid with his problems in inattention, disorganization, academics, working memory and depression. *Ex B5.* Dr. Fulop indicated T.A. was "most likely suffering from a primary alcohol and drug problem," *Ex B5 at 8*, meaning "that's the one we have to address now," although other issues might be as important or might be causative in some ways. *Tr 332-33.*

(80) Dr. Fulop recommended that T.A. attend MBA to work on his academic and therapeutic challenges. He was somewhat familiar with MBA as several of his patients had gone there. *Tr 340-41.* Also, he had spent a few hours at MBA about a year earlier observing the treatment center. *Tr 928.* Dr. Fulop thought T.A. should be in an environment

[23] One reason some young adults with ADHD use marijuana more often than others might be that, as all kids need a sense of acceptance and belonging, if a student is unsuccessful in school he or she might tend to gravitate toward a peer group in the same situation. That group might be more stimulus seeking and do things that are more out of control, one of which might be drug abuse. *Tr 952-53 (Testimony of Fulop).*

where he could work on drug issues and school related issues and address both his ADHD and his depression. *Tr 340-41.* He recommended a residential program for T.A. because of T.A.'s failure to live up to his potential in school; his difficulties at home; his attitude toward his school; his sense of hopelessness; and his drug and alcohol problem. *Tr 921-22.*

(81) Dr. Fulop recommended that the MDT at T.A.'s school consider him for special education services based upon eligibility criteria for his learning disability, ADHD, depressive disorder and drug and alcohol[24] problems. He recommended extensive "school accommodations" for T.A. including direct training in the SQ4R method[25] for test preparation and reading texts; direct instruction in note-taking; possibly a test taking course or computer program; having T.A. repeat and summarize information often; and time in the learning resource center (regular or special education). *Ex B5.*[26] Dr.

[24] There was no evidence T.A. had a significant alcohol problem.

[25] Or another, similar method. *Tr 942.*

[26] Other recommendations included shortening homework assignments; sending home a week/month's assignments in advance; grade on content, not appearance or spelling; making an organizational check of assignment sheet materials in school; permit extra time for tests; let T.A. take tests in non-distracting environment; permit short breaks during tests; adjust grading criteria; permit T.A. to retake tests; highlight main ideas in text; foreign language study waiver (due to T.A.'s difficulties with auditory memory and organizational skills); assign T.A. a low distraction work area; pause frequently during lectures to give T.A. a chance to take notes; write key points on board; give T.A. a copy of teacher outline/overheads; give T.A. feedback on his notes; break lectures or material into short segments; ask T.A. to repeat instructions often, and call on him often; provide special activities in school (computers, Internet, hobbies); case

Fulop believed these recommendations would be helpful for T.A. wherever he went to school "because otherwise it's going to be very difficult for him to survive." *Tr 346.* Dr. Fulop also concluded that T.A. needed a very structured and consistent academic and behavioral environment with consistent rules and expectations regarding homework and school. He recommended a program running between school and home designed to track and reward behaviors necessary for classroom success. *Ex B5.*

(82) In an Appendix to his evaluation Dr. Fulop explained that children with attention problems don't spend much time thinking about how to get their work done and lack both the internal executive skills and the ability to be self-motivated. Therefore these tasks must be programmed externally when children are young so that they can learn ways to internalize these functions as they get older. He recommended that a supportive team, including T.A., his parents, key or all teachers, tutor, adviser, learning specialist, psychologist and physician, meet at least twice a year to review T.A.'s progress, identify areas of difficulty, and set goals for the future. Various members of the team would meet more frequently to monitor ongoing work. *Ex B5.*

(83) Concerning the evaluation by Vinny Martin, *Ex A2*, Dr. Fulop noted that Mr. Martin's conclusion that T.A.'s difficulties were motivational did not result from use of any psychological evaluation tools, but seemed to be based solely on seeing lots of kids. *Tr 964-66.* One of the really important aspects of ADHD is that those who have it, even though they

manager assigned to oversee plan outline for T.A. *Ex B5 at 10-11.*

have appropriate intelligence, memory, etc., tend to have a hard time motivating themselves to get started. And once they get started, because of their executive functioning problems they don't plan very well. Consequently their projects tend to not be completed very well, and they get negative feedback, and then they probably get less motivated. *Tr 969.* Dr. Fulop considered T.A.'s report to Mr. Martin that if something was not interesting to him or too hard, he just started thinking about something else *(Ex A2)* an "almost perfect description" of certain types of distractibility affecting people with ADHD. *Tr 970-71.* By contrast, most high school students would probably say that when they had to pay attention in class they could do it, even if the subject matter was boring. *Tr 972.*

Dr. Booth

(84) Marilyn Booth, MD, is TA's doctor. She began a trial of antidepressants with T.A. in December 2001, apparently at the recommendation of Dr. Patchin. In March 2002 she noted "ADD?" in T.A.'s chart. Although some medications he tried had had unpleasant side effects for T.A., in May 2002 he was doing well on his current medications (Wellbutrin and Zoloft), feeling good, was able to get school work done, and his grades were improving. *Ex B6.* T.A. stopped taking his medication in July 2002 and was "doing OK" for about two months, but in December 2002 decided to start taking medication again. After resuming the medication he told Dr. Booth he was getting As and Bs in school and participating in extra-curricular and social activities. *Ex B6.* This was no longer true. In January 2003 Ms. A. relayed to Dr. Booth that T.A. felt the antidepressant was not working as well as in the past.

T.A. did not take medications consistently as required. *Exs A3 at 29, B6.*

Catherine Freer Wilderness Therapy Expeditions

(85) T.A.'s parents enrolled him at Freer after he binged on marijuana and ran away from his home. *Ex B8.* At an initial family meeting at Freer on March 2, 2003 T.A. said that he felt depressed most of the time at home. He had been smoking marijuana four or five times per week, often alone, and found marijuana helped improve his mood temporarily. *Ex A19.* He had last used marijuana around February 20, 2003. *Ex B8.* Freer gave T.A. the initial primary diagnosis of cannabis abuse and a secondary diagnosis of depression NOS. These diagnoses were in an unsigned evaluation apparently prepared by Danielle Koehn, "therapist," and Kevin Riley, LCSW. *Ex B8.* Initial interventions for T.A. at Freer were to include psycho-educational groups in various subjects including addictive characteristics, relapse prevention and recovery, anger management, and role playing and staying calm. Individual psychotherapy four times a week and group psychotherapy five times a week were also planned. *Ex B8.*

(86) On or before March 6, 2003 T.A. began a trek with other Freer students and Freer staff. He made good progress with camping and hiking skills although he completed tasks slowly. Freer staff observed that T.A.'s mood had improved but he was fearful his depression would return after the trek. Freer staff felt T.A. had fairly serious depression and by March 10, 2003 were recommending a structured, therapeutic out-of-home placement that would address T.A.'s depression and his drug use. *Ex A19.*

(87) T.A. was discharged from Freer on March 22, 2003. Although he made a commitment to abstain from alcohol and marijuana at the time of his discharge, Freer staff questioned the sincerity of his commitment. With regard to his "recovery environment" the staff concluded T.A.'s peer group was almost entirely drug users and while his family was supportive, their work schedules made them incapable of providing the constant supervision he required. Upon discharge the Freer staff recommended that T.A. have 24 hour adult supervision; live in a structured environment with clear rules and expectations; participate in ongoing drug and alcohol, cognitive behavioral and family therapy; attend 12 Step meetings; develop a new peer group; and participate in regular physical exercise. The discharge report was written by Silas Halloran-Wright, BA, CADC (Certified Alcohol and Drug Counselor), Wilderness Guide, and reviewed by Mr.Riley, Clinical Coordinator. *Ex A19.* Mr. Halloran-Wright also prepared a "Multi-Axial Assessment" at discharge, reviewed by Mr. Riley, which again identified T.A.'s primary diagnosis as cannabis dependence and his secondary diagnosis as depression NOS. *Ex A19; see also Ex B9.*

(88) On Wednesday, March 12, 2003 Mr. Riley informed Mr. and Ms. A. that the Freer staff was recommending a structured, therapeutic out of home placement that would address T.A.'s depression and his drug use. One day later Mr. and Ms. A. were looking for an alternative home for T.A. in Oregon or Washington and were getting information from Mount Bachelor Academy (MBA). By March 14, 2003, when they met with Dr. Fulop to receive his preliminary test results, *Ex A19,* Mr. and Ms. A. had decided to send T.A. to residential treatment after he

left Freer. *Ex A19.* The school they selected was MBA.

Mount Bachelor Academy

(89) Although FGHS staff believed T.A. had entered PCC at the beginning of April 2003, in fact his parents enrolled him at MBA on March 24, 2003 to continue his education. *Ex A13.* On what appears to be the application form Mr. A. wrote that he had heard about the program from Dr. Fulop, and that enrollment was precipitated by "inappropriate behavior, depression, opposition, drug use, runaway." His specific objectives for T.A. at MBA were "improved verbal processing skills, relationship ability, control depression, study habits." He noted that T.A. had been taking Zoloft for the past four weeks as prescribed, but his history with regard to taking medications was "irregular and resistive." *Ex A13.*

(90) MBA is a residential school which describes itself as providing a "well-rounded academic and emotional growth curriculum that is designed for children who may have academic, behavioral, emotional, or motivational problems." *Ex A13.* The emotional growth curriculum is the school's therapeutic component. *Tr 525.* Most of the 85 students at MBA have some type of learning disability and approximately 40%, or more, have ADHD. Many of the students have drug and alcohol abuse issues. *Tr 525, 528-9.* Academic classes at MBA are attended by up to 10 students. *Tr 527.* Many classes employ experiential, hands-on techniques to keep the subject matter exciting and interesting for students. Each student is assigned a mentor who works with the student as the student progresses through the "emotional growth" component of the curriculum. Students live in dorms with three or four others and

are expected to share housekeeping responsibilities. *Ex A13.* At least as of August 6, 2003 MBA has been approved by the State to provide special education programs and services for children with disabilities. *Ex A24.*

(91) An Educational Information form prepared at MBA stated that T.A. had the following specific learning problems: auditory memory; auditory discrimination; expressive language, organizational and time management skills; and processing speed, especially in math. Also low processing speed in reading when speed was required. It described T.A.'s academic limitations as reading speed; timed tests; poor spelling; confusion with number sequencing (i.e. hearing 233 instead of 332); difficulty with equations; difficulty with expressing himself, very slow speech; difficulty completing assignments; unorganized note taking; difficulty with outlines; and poor recall of material. This information came from psychoeducational evaluations (obviously including Dr. Fulop's) and the Learning Needs Coordinator. It made the following recommendations (among others): all standard accommodations and modifications for ADHD; teach T.A. organizational skills and note-taking techniques; frequent check-ins with T.A. to help him break tasks down into smaller pieces; teach SQ4R method (or similar) for test preparation and reading textbooks; allow T.A. to choose projects and activities of interest to him, and discuss topics with him to "hook" his curiosity to learn about the subject. *Ex A13 at 33-34.*

(92) T.A. completed an Academic Survey at MBA on which he identified his best subjects as history, English and art and his worst subject as math. *Ex A15.* On a scale of 1 (horrible) to 10 (excellent) he

rated himself 0 in organizing a binder and staying caught up in classes; 2 in studying for a test and managing his time; and 5 in keeping track of assignments, solving basic math problems, and completing large projects. He identified his greatest strengths (10) as reading for pleasure; drawing, painting and/or other arts; music; and creative writing. He liked to learn best "by experiencing." He reported, "I enjoy learning. I get very bored and wander sometimes." *Ex A15.*

(93) T.A. has a Student Action Plan (Plan) at MBA with academic, social and other goals. His first academic goal is: "[T.A.] will develop self-management skills for ADHD to improve his academic performance and to help prepare for further education or a vocation." His objectives include attending four Academic Seminars to help him learn about time management and study skills, among other subjects. The Plan also states, as objectives, that T.A.'s teachers and mentors will monitor his organization and time management and teach strategies within the context of the classroom and the dormitory; and that T.A.'s teachers and staff members will model time management and organizaional strategies. A second goal is: "[T.A.] will improve his time spent on task during classes." This goal is accompanied by the following objectives:

1. [T.A.'s] teachers will use multi-modality instruction to help engage him in class activities.
2. [T.A.'s] teachers will use natural consequences to help bring awareness to wasted time.

3. [T.A.'s] teachers will help him prioritize, plan and estimate completion time for all assignments, along with setting daily class goals.

4. [T.A.'s] teachers will communicate weekly with [his] mentor and the learning needs staff about his progress in this area, so that they are able to provide additional support when needed.

(94) Lisa Fairman has been the learning aids coordinator (special education teacher) at MBA for four years. She has a Master's degree in education and some postgraduate course work toward receiving a special education teaching license. She has a transitional Oregon teaching license in English and special education. She has worked with children with ADHD and mental health issues since April 1997. *Tr 523-24, 550-51.* Ms. Fairman observed that T.A. "struggle[d] with education" had an extremely difficult time focusing in class, being motivated to want to do well in class, sometimes to even get to the classroom. *Tr 529.* In October 2003 Ms. Fairman identified T.A.'s greatest need, academically, as learning how to keep himself engaged in a task even if it was not something he wanted to be doing, including setting up some self-motivators to help himself get through such tasks. *Tr 548.*

(95) T.A., like almost all of the children with ADHD with whom Ms. Fairman has worked, cannot anticipate how long it will take him to accomplish academic tasks and is not good at breaking such tasks down into segments. *Tr 537.* T.A.'s teachers have reported to Ms. Fairman that T.A. has a very difficult time attending to his work and needs a great deal of redirection. She has advised his teachers to set daily goals for each class (read this many pages, find this

number of resources), to help him learn how to break large tasks into smaller parts. This is a strategy teachers use with other students who have ADHD. *Tr 539.*

(96) T.A. can come to Ms. Fairman for advice about how to do better in class, how to keep himself focused, and how to get caught up in class when he falls behind. Ms. Fairman has assisted T.A. with his school work and found that it was really difficult to get T.A. engaged in the subject matter at hand, and that he had a really hard time producing school work. She observed, helping him do research, that he would find a different topic that interested him and forget his goal. He needed a lot of redirection to return to his task. *Tr 530-31.* In the weekly teachers' meeting at MBA, if teachers raise concerns about T.A. she gives them advice and often follows up with resources they can use for example, graphic organizers for a particular assignment. *Tr 531.*

(97) At MBA teachers do not assign homework. If students fail to complete class work they can work on their assignments at a study hall period on Sunday afternoons and during some free time in the evenings. T.A. usually did not get all of his work done in class, but his teachers were accommodating him by not giving deadlines and continuing to work with him to help him complete tasks (which Ms. Fairman described as "one of the ways that the teachers are giving him specially designed instruction"). MBA would not give T.A. a failing grade because of his (poor) time management skills. *Tr 575-76.* It was possible for T.A. to get help with his academic work from a peer tutor or a staff person during study hall, or from his mentor, but Ms. Fairman did not know whether he was receiving such help. *Tr 578.* Ms. Fairman thought

T.A. was receiving coaching and therapy for his ADHD issues by being at MBA, from his class room teachers and the mentoring staff. The mentors had Bachelor's degrees and were not licensed counselors. *Tr 583-84.* Coaching would include assisting students with daily life skills such as keeping their living spaces and their backpacks organized and, by the teachers, through the structure of the classrooms and helping students break larger tasks down into smaller pieces and setting short-term, rather than long-term, goals. *Tr 586.*

(98) At MBA grades for credit are usually issued in June and December, with progress reports at other times during the year based on the student's work to date. *Tr 541. But see Ex A13 at 1.* T.A. received a report card on June 19, 2003, after his teachers completed General Education Teacher Reports about him on June 11, 2003. His grades were A in Communication Skills, B in Dependency and Recovery, and B+ in Biology. He had spent insufficient time in his British Literature, Algebra and Physical Education (P.E.) classes to receive grades. *Ex A13.* Mr. Austin, his teacher for British Literature, reported that he was still getting acquainted with T.A. and his needs because T.A. had only been in his class for a couple of weeks; however, the strategies he used with T.A. included consultation with the special education teacher and individualized instruction. He observed that T.A. needed some one-on-one time to help him stay focused. Mr. Austin needed to check in with T.A. regularly to ensure that he was heading toward successful completion of his assignment. Mr. Austin remarked, "I see him getting lost in a large classroom, where he won't draw attention because he won't be acting out." *Ex A22.* Mr. Harris, the P.E. teacher, reported that he used adapted instructional materials with T.A., and the

class was small enough to be able to adapt activities to each student for the most part. *Ex A22.* Mr. Miller, the Biology teacher, utilized strategies including consultation with the special education teacher and the counselor, adapted instructional materials[27] and individualized instruction with T.A. He found that to be successful T.A. needed lots of hands-on, interactive instruction, small class size and one-on-one instruction. *Ex A22.* He noted that T.A. needed to focus more on the class work. *Ex A13.* Mr. Creswell, who taught Dependency and Recovery, found T.A. easily distracted. *Ex A13.* He used strategies including consultation with the special education teacher, adapted instructional materials and alternative testing methods with T.A. He also allowed manual activity during non-writing activities. He felt T.A. needed hands-on activities in order to be successful in his classroom. *Ex A22.* T.A.'s Algebra teacher described him as "Detached and unwilling to participate." *Ex A 13.*

(99) T.A. received a Student Progress Report at MBA on July 30, 2003. It noted, "So far this semester he has struggled with things like arriving on time, maintaining focus, and meeting deadlines all things that have been problems in the past and are related to his diagnosis of ADHD * * * . His classroom behavior and attention to tasks seem to be directly related to his overall mood and current emotional work as emotional struggles increase, classroom problems increase." *Ex A13.*

(100) T.A. received an Academic Progress Report at MBA on August 7, 2003. His Chemistry teacher

[27] Examples of adapted instructional materials in other subjects included video projects in history and sculpting geometric shapes in geometry (special education). *Tr 533-34.*

observed that T.A. was a very bright, capable student when he applied himself but he had difficulty getting motivated for chemistry. He was often late to class, did not engage well in assignments or labs with other students, and was easily distracted. She frequently put him in study hall to get work done but he had not been very productive. He currently did not have enough work done to earn a grade. In Political Science his teacher commented that T.A. enjoyed participating in class discussions but had some difficulty staying on task. He tended to "fade out" of the assignment he was supposed to be working on and had not handed in enough work to get a passing grade. In British Literature Mr. Austin, still his teacher, found T.A. very bright and curious but tough to keep on task. He tended to get distracted easily and needed to be refocused. He was passing. In General Art his teacher considered him very talented but easily distracted, commenting that he needed to learn to follow direction, even when he thought work was below his skill level, and do his projects at an advanced level. His approximate grade was B. *Ex A22.* In Applied Geometry, a specially designed instruction class with three students, *Tr 534,* his teacher Mr. Miller again found that T.A. seemed to do better with hands-on projects and was staying "reasonably on track" working on geometric sculptures. Mr. Miller reported, "[T.A.] is very easily distracted. Some of this can be attributed to the way his mind works but some of it is definitely within his control and I would like to see him exercise more of that control." His approximate current grade was C. *Ex A22.* At the end of September 2003 T.A.'s grades on his progress report were incomplete in Chemistry, F in Political Science and incomplete in Applied Geometry (all due to failure to complete enough work to earn credit possibly because

he had been removed from some classes to work on the emotional growth curriculum); C- in British Literature, C in Communication Skills group, and B in Art. His teachers continued to comment that he was easily distracted and struggled to stay motivated and involved in class work. *Tr 541-42.* Nevertheless, it was anticipated T.A. would graduate at the end of his senior year, in June 2004. *Tr 545.*

(101) T.A. committed a number of serious rule violations at MBA. These included sneaking into a female student's dormitory and having sexual intercourse with her; leaving his dormitory late at night and wandering around the campus; and one night leading a group of students to break into a "sacred" building on the campus and into locked closets and cabinets in the building. *Ex B25.* He worked on a "self-reflective study" from June 16 to July 14, 2003 to address the emotional issues which MBA staff believed had resulted in these behaviors. *Ex B25.*

(102) Monthly tuition at MBA is $5200. In addition T.A.'s parents paid an application fee ($50), admission interview fee ($1500), linen fee ($275), and "alumni services" fees ($1200 in March and $2000 in April and May 2003). They were charged $320.50 for wilderness clothing (presumably for T.A.) and $680 on April 2, 2003 for a psychological evaluation by Dr. Conway. *Ex A13 at 14.*

Hearing Request

(103) Mr. and Ms. A. requested a hearing on April 18, 2003, seeking (among other remedies) an order requiring the District to evaluate T.A. in all areas of suspected disability (Other Health Impaired (OHI) and Emotionally Disturbed (ED)). *Ex A4.* The District then initiated the evaluation process. *Exs A5, A6.*

Dr. Neill's Assessment

(104) Dr. Patricia Neill is a school psychologist who was engaged by the District in June 2003 to visit MBA and assist in determining whether T.A had a disability that significantly interfered with his educational performance in the general education program. *Tr 65.* She has earned a Bachelor's degree in psychology; a school psychologist certification and a Master's degree in educational psychology (1976-79); and a Ph.D. in educational psychology (1981). *Ex B21.* She has participated in many continuing education programs, and has conducted a number of trainings and workshops in her field. *Tr 54.* A majority of her career has been working directly with public schools and school-based programs, or training people to work in such school and programs. *Tr 53.* She has been employed for many years as a school psychologist, and has also worked as a special education facilitator; the chair of the school psychology department at a university; a research therapist; and an evaluation specialist. She has taught courses in many subjects at the college level. *Ex B21.* While employed by the Beaverton School District several years ago she wrote a paper describing how to assess students for special education. *Tr 49.* She is currently employed with the Northwest Regional Education Service District to provide support to school age special education programs. *Tr 39, 47-48.*

(105) Dr. Neill has assessed well over 1000 students for eligibility for special education. She believes that "special education is designed to service kids with very significant disabilities that interfere a great deal with their ability to benefit from the education program." *Tr 52.*

(106) Although Dr. Neill would have preferred to do her own assessment of T.A., as he had just had a "very, very, very comprehensive evaluation done by Dr. Fulop" (*Tr 63, Testimony of Neill*) and MBA was just finishing administering the Kaufman Test of Educational Achievement (K-TEA) to T.A. when she arrived there, she relied upon the prior testing. *Tr 63-64.* Another reason Dr. Neill did not retest T.A. is that certain tests are not supposed to be repeated in less than one year. *Tr 64-65.*

(107) As part of her assessment Dr. Neill reviewed T.A.'s records from the District, reports from Freer, MBA records, Dr. Fulop's report and Dr. Patchin's report (presumably the letter of May 3, 2003). She spoke briefly with Dr. Patchin and interviewed FGHS staff. *Ex A17, Tr 976-77.* She informed Ms. A. that she would be going to MBA to do some testing but did not ask Mr. or Ms. A. for any information about T.A. *Tr 978, 1219.*

(108) Dr. Neill saw nothing in T.A.'s middle school grades which would have "raised a red flag" in terms of referral for special education. However, if T.A.'s parents (or teachers) had been contacting her at that time and expressing concerns, she would have begun working with the parents and T.A. to find out what was going on, and begun to intervene. *Tr 89-90.* Dr. Neill concluded T.A.'s high school grades for two and one-half years indicated that it was very likely he had the skills to do the work but was not getting the work in, or was having a problem getting the work in. *Tr 91-92.*

(109) Dr. Neill visited MBA on June 10-11, 2003 to observe T.A. and speak with him and MBA staff. She conducted an informal academic assessment of T.A. and had Behavior Rating Scales for Children

(BASCs) completed by T.A. and by his teachers, Mr. Miller, Mr. Austin, Mr. Creswell and Mr. Harris. None of these nor a BASC completed by Mr. Thias on June 3, 2003 showed problems in the clinically significant range. *Exs A17 at 7-8, B15.* At that time one or more of the MBA teachers had only been teaching T.A. for a few weeks. *See Ex B15 at 1.*

(110) When Dr. Neill observed T.A. in his science class at MBA he appeared to be focused and fully engaged with the academic tasks, attentive to the teacher and the directions. He also seemed task oriented during his math class, where he was completing a test. *Ex A17, Tr 979.* The classes where Dr. Neill observed T.A. at MBA had approximately five to seven students, while classes at FGHS have approximately 30. *Tr 974.* During lunch, free and passing times at MBA Dr. Neill observed that T.A. appeared to associate with small groups of students or he stayed alone, appearing comfortable in all situations. *Ex A17.* He was able to sit through lunch, with a couple of other students. *Tr 1037.* Although T.A.'s schedule at MBA was very fluid he understood how to find out where he was supposed to be and go there. *Tr 100.* He knew where to get the materials he needed. *Tr 1038.* T.A. was open and forthcoming with Dr. Neill. *Ex A17.* He told her that he liked school and learning and enjoyed reading and writing. *Tr 101.* He said his main difficulty with school was getting his work done, and that was very much tied to his interest and whether he was bored with it. *Tr 100.* Because Dr. Neill saw T.A. after he had been at MBA for several months time, it is possible he was doing better than he had been initially due to the effects of the treatment program there. *Tr 959 (Testimony of Fulop), 979.*

(111)MBA assessed T.A.'s academic skill development using the K-TEA in June 2003. The examiner observed that T.A. was distracted very easily. *Ex B10.* T.A.'s composite scores, based on age norms, were in the 77th percentile for reading (above average grade equivalent above 12.9) and the 25th percentile for mathematics (average grade equivalent 7.9). *Ex B10.* Dr. Neill came to the following conclusion:

> These scores indicate a relative (to himself and his age-mates) weakness with fractions, advanced computations, and algebraic equations. During informal math assessment and observation in his math class, there were no indications of math processing deficits or specific disabilities in the area of math. There appear to be some holes in his skill development rather than a math learning disability.

Dr. Neill also commented that "[T.A.'s] assessed academic skill acquisition and overall classroom performance (with the exception of work completion) are commensurate with his assessed potential for learning. Maintaining interest, focus and attention to task are reportedly (teachers and self-report) problems for [T.A.]." *Ex A17.* She acknowledged that the staff at MBA were well versed in ADHD and would be "more hypersensitive to noting attention and focus and distractibility." *Tr 120.* She recommended that a meeting be held to review the evaluation results to determine whether T.A. was eligible for and in need of special education services. *Ex A17.*

Ms. Flick and FGHS

(112)Betty Flick became the Assistant Student Services Director in the District ten years ago, and

when the Director retired in 2003 she was promoted to his position. She has a Bachelor's degree in child development with standard elementary, standard severely handicapped, and standard learning disability certifications. She also has a Master's degree in counseling and an administrative certification through the State of Oregon. She has worked as an instructional assistant; a learning disability specialist for two years at a time when children with ADHD were identified as learning disabled; and a resource room teacher for three years with emotionally disturbed, learning disabled and other students. She also taught in a regular education classroom, although approximately 10 of the 38 students had various handicapping conditions. Thereafter, for eight years, she worked as a child development specialist in the District, providing counseling and evaluation for special education services. The majority of the students she saw as a counselor at the elementary level had attention problems. She was responsible for testing and evaluation for special education services for about half of the students in the District (she conducted about 50 evaluations each year). *Tr 354-58.*

(113) Ms. Flick estimated that throughout the District there might be 285 to 570 students (five to 10 percent of the student population) with ADHD, with 27 on 504 plans for ADHD and at least 27 eligible under the IDEA as OHI due to ADD or ADHD. *Tr 361-64.* In Ms. Flick's opinion, the difference between those who did and did not qualify for services under the IDEA or 504 plans was "definitely the severity of the behaviors that they demonstrate within the school setting." *Tr 364-65.*

(114) Reviewing T.A.'s grade record before the IDEA meeting, Ms. Flick concluded that T.A.'s ADHD was

not having an adverse impact on his educational performance because he was not having academic difficulties "across the board in all classes," and had gotten B's or C's in some of the more challenging academic classes (for example, world studies). *Tr 419-20.* Although T.A. had received some failing grades he was not "flunking out" of school, and was advancing with his class at FGHS at the end of each semester until he left the school.

(115) At FGHS many students did not turn in their homework. Ms. Flick related this, at least in part, to the fact that the District had a very high proportion of students whose families were not wealthy, and who were eligible for free and reduced lunch; quite a few of the students were holding down jobs as well as attending school. Ms. Flick also noted that there were many students in the District for whom English was a second language. *Tr 1341-43.* The number of failing grades T.A. received at FGHS was not unusual. In the Fall semester of 2002 approximately 210 of the 504 freshman students in the District had grades of F in one or more classes. *Tr 366.* In Fall 2003 FGHS had a new plan to assist students who had three or more grades of F (out of 8 classes) on a progress report. *Tr 1309.*

(116) At FGHS there was some instruction in study skills in career education classes; the school sold notebooks with dividers and a calendar which students could use for their A and B block days; one of the health teachers and a lot of the teachers of freshmen helped the students get their notebooks organized and write down their assignments, and many of the teachers helped the students with note-taking. *Tr 215-217.* Some of Dr. Fulop's recommended academic adjustments for T.A. were implemented routinely by

some of the teachers at FGHS. Some teachers gave out assignments in advance; teachers might make modifications (such as reducing homework assignments) for students when necessary in special circumstances; and teachers might have a variety of activities in 85 minutes of block time rather than having the students sit and take notes throughout the block. *Tr 229-33.*

MDT: IDEA Meeting

(117) An MDT met on July 7, 2003 to determine whether T.A. met the disability criteria in the IDEA for a learning disability, ED or OHI. The following MDT members participated in the July meeting: Ms. Flick, Mr. and Ms. A., Dr. Patchin, Mr. Garlock, Ms. Voigt, Ms. Reikofski, Dr. Neill and Ms. Pappelis. Ms. Nancy Hungerford and Ms. Broadhurst, attorneys, were also present. *Ex B20.*

(118) As part of the evaluation process Dr. Patchin submitted a statement indicating that health conditions that affected T.A.'s educational performance were major depressive disorder, dysthymic disorder, and ADHD, combined type. *Ex B16.* Dr. Booth submitted a statement the next day identifying the conditions affecting T.A.'s educational performance as ADHD and a math learning disorder. *Ex B17.*

(119) Mr. and Ms. A. had the opportunity, at the MDT meeting, to describe T.A.'s struggles and behaviors; the amount of work they did throughout his school career to enable him to complete his homework and school work; and the fact that he brought an inordinate amount of school work home that he could not complete in class. They explained the extra efforts they (mostly Ms. A.) made throughout T.A.'s high school years to contact teachers, gather missing work

and provide T.A. a structured environment at home in which to do his school work. *Ex A26.* When A.A. tutored T.A. she taught him a lot of study skills. *Ex B20.* Nevertheless, the parents related that they typically spent two to four hours most week nights and significant time on the weekends helping T.A. with school work. They said T.A. particularly had trouble at FGHS with projects, reports, and completing school work and turning it in. He was given numerous opportunities to redo work, turn in late and missing assignments, retake tests, etc. One or more of the MDT members said T.A.'s school record did not show an adverse affect on his school performance since he was not completely failing school, although his grade point average had dropped significantly since middle school. *Ex A26.* When the parents brought up incidents in T.A.'s school history that required parent visits to school and conferences with teachers, T.A.'s depression and anxiety issues, his daily struggles with homework, etc. Dr. Neill and possibly one or more of the other District MDT members responded that that information was not in the school records and should have been brought up earlier. *Ex A26, Tr 1005, 1283-86, 1292-95, 1299-1300.*

(120) Mr. A. did not feel the District representatives (with the possible exception of Mr. Garlock) considered the parents' information, because of the repeated comments that the information was not in the record and could not be considered at the meeting, and that the District had no control over what happened in the home and it could not be considered, etc. *Tr 1052; see also Tr 654 (Testimony of Patchin).* Mr. A. did not believe all or most of the District representatives took into account the fact that a lot, or

most, of the school work T.A. completed to get passing grades was accomplished at home. *Tr 1054.*

(121) Dr. Neill identified "specially designed instruction," in the context of the IDEA, as the need "to modify, very significantly change, the method that we're using, the techniques that we're using, the delivery system, the level of it, significant changes in how and what we're teaching order [sic] for the student to benefit and learn." *Tr 130.* She thought all of the suggestions in Dr. Fulop's report were accommodations which were provided in the general education process (although they could also be provided through special education or a 504 plan). *Tr 130.* Dr. Neill did not believe that, if a student was eligible for special education services and the District did not offer an appropriate education including those services, the District could be responsible for paying for a residential placement for the student. *Tr 1019-1021.* She thought a child with severe ADHD would "tend to have the activity level, * * * hyperactivity level, impulsivity, jumping mentally and physically from thing to thing to thing to thing, a great deal of difficulty staying with task and with thought and maintaining that kind of intact processing." *Tr 111-12.*

(122) Dr. Neill related that MBA staff reported T.A. was very on task and very engaged in his studies. *Ex B20. But cf Findings of Fact nos. 95, 98, above.*

(123) At the IDEA and 504 meetings Dr. Patchin had an opportunity to offer comments and information about T.A. from her past experience. *Tr 32.* She explained at the IDEA meeting, and earlier to Dr. Neill, why she believed T.A. met the eligibility criteria for special education services. She had also explained to Dr. Neill previously why she thought the District

made an error in their original assessment of T.A. *Tr 657-58.*

(124) The MDT acknowledged that T.A.'s emotional or behavioral problems had existed over an extended period of time, but all members except Mr. and Ms. A. and Dr. Patchin agreed that T.A. did not qualify for special education in the area of ED. (Also, all members of the MDT except Mr. and Ms. A. agreed that T.A. did not qualify for special education in the area of learning disability (Dr. Patchin did not vote)). In the area of OHI the MDT concluded T.A.'s condition, ADHD, was permanent or expected to last for more than 60 calendar days, but the majority declined to find that his disability had an adverse impact on his educational performance. *Ex A14.* Dr. Neill commented that the IDEA was intended to serve only those students whose disabilities had a "very severe, significant impact" on their education, and who had "tremendously significant disabilities." *Tr 897 (Testimony of Pappelis).* When the District representatives of the MDT discussed the question of whether T.A.'s disabilities OHI and depression had an adverse impact on his educational performance, they considered whether they had a "severe, significant impact," and concluded it was not severe enough. *Tr 660.* All voting members of the MDT (Mr. Garlock left early and did not vote) except Mr. and Ms. A. and Dr. Patchin agreed that T.A. did not qualify for special education in the area of OHI. *Ex A14.*

MDT: 504 Meeting

(125) The District conducted a Section 504 eligibility meeting for T.A. on August 26, 2003. Participants included Mr. and Ms. A., Dr. Patchin, Ms. Flick, Mr. Thias, Ms. Reikofski, Ms. Voigt and Dr. Neill. *Ex B24.* Ms. Nancy Hungerford and Ms. Broadhurst also

participated. Mr. and Ms. A. took notes at the meeting and reported the following:

> We described life with [T.A.] and how his depression and anxiety made it so difficult for everyone at home. We had worked hours each evening for years to focus [T.A.] on his 'homework' (which also was make-up schoolwork which he couldn't get done in class). Tears, tirades, constant refocusing and arguing were the norm at home. Many assignments were done two or three times because [T.A.] would forget to turn them in or would lose them the next day. He had many test retakes over the years. His Spanish teacher * * * offered that if [T.A.] would draw him a cartoon in Spanish he would pass him. All this means that without the special help at home (including tutoring by his college-age sister) and allowances by his teachers, he would not have been able to progress as far as he did in his school career.

Ex A27. The parents also reported that T.A. had difficulty following directions for building models, playing board games and executing simple recipes; could not sit still during meals; was unable to monitor his own time and needed timers or reminders; couldn't follow through and execute tasks and had other difficulties coping with daily life. *Ex A27, Tr 1055.*

(126) On the Section 504 Action Plan for T.A. the MDT members concluded T.A. had a physical or mental impairment (identified on the form as mild depression and ADHD). Ms. Flick explained that "substantially limits" means can't do it at all. *Tr 1215.* Dr. Neill thought 504 plans were more typically developed for kids that are on medications that have a significant impact in terms of work production, or movement through the halls, passing in class. *Tr*

1001. Ms. Voigt, Ms. Flick, Dr. Neill and Ms. Reikofski thought T.A.'s impairments did not substantially limit a major life activity; consequently he was ineligible for services/accommodations. *Ex B24.* Mr. A., Ms. A., Mr. Thias and Dr. Patchin disagreed. *Ex B24.* Dr. Patchin believed T.A.'s disability substantially limited his ability in the major life activities of learning, working and caring for himself. In the area of learning she observed that he had limitations in (at least) getting his materials together and sitting down and focusing. *Tr 691.* Ms. A. felt her input at the meeting was not valued, as the problems she and Mr. A. described were met with such comments (at this and the IDEA eligibility meeting) as, all kids do that; it's not in the school records; and, it can't be considered if it happens outside of the school day. *Tr 1215.*

Dr. Callum

(127) Dr. L. Martha Callum received her B.S. in biology and psychology (1978), her M.S. in interdisciplinary counseling psychology (1987), and her Ed.D. (1997) concentrating on neuropsychology. She also has postdoctoral training in neuropsychology. She has been employed in the past as a school psychologist/neuropsychologist and a teaching associate in educational psychology. *Ex B22.* She has been employed from 1999 to the present as the District Behavioral Specialist in the Hillsboro, Oregon school district. In that position she is a consultant in 26 schools for the teachers, principals, psychologists and others who deal with children with disabilities. She consults about behavior, attention deficit, learning disabilities and anything else that impedes a child's performance significantly. *Tr 786.* She related that in her previous work in other states, over the course of 10 years she conducted over 250 student evaluations annually to

identify 13 disabilities that are federally regulated, including ADHD, and she served on eligibility teams for all of the students she evaluated. *Tr 787-88.*

(128) Dr. Callum reviewed the reports of Drs. Fulop, Neill and Patchin; the reports from Freer; and all of T.A.'s grade reports starting with kindergarten. She also reviewed the testimony of four of the teachers who testified at the hearing (Ms. Vieth testified after Dr. Callum). *Tr 798.* She did not meet any of the psychologists or teachers or T.A. or his parents; she only had written information. *Tr 810-11, 862.* She found no information in T.A.'s educational history (that was available before the parents placed T.A. at MBA) which would have indicated to her that T.A. should have been referred for an assessment for eligibility under the IDEA or 504. *Tr 798-99, 845. But see Finding of Fact no. 21, above.*

(129) Dr. Callum noted, from comments on T.A.'s grade reports, that in 7th and 8th grade he had missing assignments and indications of issues with time management and following instructions, but observed that he had no failing grades and concluded he eventually got his work in. She stated,

> So the big crux in the 7th and 8th grade were the missing assignments, but yet an a true ADHD child with no other difficulties surrounding it would not be able to do that. They just don't have the ability to say, I've got to get organized and I've got to get my assignments in in order to get my grade in. * * * [T.A.] knew exactly what he had to do and he got his assignment turned in to turn his grades around.

Tr 804-05. When asked how based on the information she had reviewed T.A. differed from the

students with ADHD who were found eligible as OHI under the IDEA, or eligible under 504, Dr. Callum said, "He has a lot of things going for him. For whatever reason, he always managed to get his work done." *Tr 810.* Reviewing the parents' description of the assistance they provided for T.A., in Exhibit A26 at 2, she said,

> [L]ooking at this paragraph, it's nothing different than what I've dealt with students in the high school setting where parents come to me and say they're very concerned, that they also have missing assignments and that they spend six hours a night with their kids, that they have to, you know, literally ground them to get them to do work.
>
> This is nothing that again stands out significantly different from the average high school student. Some kids require parents to just be on top of them and provide that structure at home.

Tr 812. Dr. Callum also concluded, "[L]ooking through all the records, [T.A.'s] ADHD had nothing really to do to impede his academic performance, while what's seeming to be the cause here is the substance abuse causing the deterioration in family relationships and also the educational performance, which goes along with what happens when you have substance abuse in cases like that." *Tr 817-18.*

(130) Dr. Callum observed, based on the records she reviewed, that T.A. was focused in class, in contrast to students on whom ADHD had an adverse impact. But she acknowledged that "[i]f students with ADHD have a connection, if they have a relationship, if they have an interest in the subject matter or in the teacher or in the particular environment that they're in, they will then be able to concentrate and

be able to do it." *Tr 822-25.* Although, according to Dr. Callum, even with those favorable circumstances a student with ADHD might not necessarily continuously be able to follow what is going on in class when the class lasts for 90 minutes. *Tr 875.* Her theory not shared by the other psychologists involved in the evaluation was that "the oppositional behavior type of diagnosis * * * [seemed] to be more what's going on here than just attention deficit. Attention deficit seems to be more of a secondary, possibly, tertiary. *Tr 826.*

(131) To Dr. Callum "adverse impact" as used in the IDEA, and "significantly impaired" meant a child's disability did not allow the child to be able to meet minimum course requirements. *Tr 827.*

(132) Dr. Callum thought FGHS was like many other high schools in allowing students 20 to 30 minutes of class time (out of a class period of approximately 85 to 90 minutes) to work on class work and homework, with the teacher available for assistance. One of the reasons for this was that a lot of students did not have support at home. *Tr 838.* She thought many high school students worked with their parents at home for two to four hours to complete their homework and class work, but it was not the expectation of the high schools that parents would be involved to that extent. *Tr 836-38.* Based on her document review she believed the time T.A. had to do his work in school (20 to 30 minutes during a class period) was sufficient to meet the requirements of his classes. *Tr 839-40.* She assumed he got his class work done during that time and wondered what work he did at home and why it took so much time. *Tr 83-40.*

CONCLUSIONS OF LAW

(1) The District had the burden of proving that it offered T.A. a free appropriate public education (FAPE) under the IDEA, including an appropriate evaluation. The District failed to meet that burden.

(2) T.A. is eligible for special education under the IDEA as a student with an Other Health Impairment.

(3) T.A. is eligible for services under Section 504 of the Rehabilitation Act of 1973 as a qualified handicapped person.

(4) The District is not responsible for reimbursing the parents for the cost of the evaluation by Dr. Fulop.

(5) The District is not responsible for reimbursing the parents for the cost of Freer.

(6) Until the District offers T.A. a FAPE, the District is responsible for reimbursing the parents for their necessary expenses to send T.A. to MBA.

OPINION

The Individuals with Disabilities Education Act (IDEA, or Act), as amended effective June 4, 1997, is a response to a finding by the Congress that "[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabili-

ties." 20 *United States Code* (USC) §1400(c). One purpose of the Act is to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living. 20 USC §1400(d).

To receive financial assistance from the federal government under the Act a State must ensure, among other requirements, that a FAPE is available to all children with disabilities residing in the State between the ages of 3 and 21 (with certain exceptions irrelevant here) 20 USC §1412. Federal regulations implementing the IDEA are found at 34 *Code of Federal Regulations* (CFR) part 300, and apply to each state that receives payments under Part B of the IDEA. 34 CFR §§300.2, 300.4. The federal regulations are for the most part mirrored in Oregon Administrative Rule (OAR) 581-015-005 *et seq.*

Burden of Proof

In an administrative hearing the school district has the burden of proving compliance with the IDEA including the appropriateness of its evaluation and its proposed placement for a student. *Seattle School Dist. No. 1 v. B.S.*, 82 F3d 1493, 1498 (9th Cir 1996). The District has the burden of proof on the issue of whether it offered T.A. a FAPE, and in particular whether its determination that he was not a child with a disability, and was not eligible for special education services, met the requirements of the IDEA.

Furthermore, I conclude that although at least under the IDEA the parents do not have the burden of proof, they have shown by a preponderance of the evidence that T.A. is a student with a disability

ADHD, an Other Health Impairment who is eligible to receive special education services, and who is entitled to the benefits of Section 504 as a qualified handicapped person. *See* 34 CFR §§104.3, 104.33.

The Disability at Issue

Mr. and Ms. A. initially claimed that T.A. had a specific learning disability in the area of math but they later withdrew that contention. At the hearing they took the position that T.A. should be considered a child with a disability under the IDEA due to an OHI resulting from his ADHD, or due to an emotional disturbance (ED). In their closing brief the parents, in setting forth proposed ultimate findings of fact, no longer allege that T.A. suffers from an ED. *T.A.'s Closing Brief at 7-8.* They request that if T.A. is determined to be a student with an OHI, there be no finding as to whether he also meets the criteria for ED. *T.A.'s Closing Brief at 31.* Consequently I consider that issue withdrawn and do not address it.

Other Health Impairment (OHI)

School districts shall identify, locate and evaluate all resident children who may have a disability and who may need special education services. OAR 581-015-0037. "Children with disabilities" includes children who require special education because of other health impairments. OAR 581-015-005(4); 34 CFR §300.7. OHI is defined in OAR 581-015-005(4) as follows:

> (h) "Other Health Impairment" means limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment, that:
>
> (A) Is due to chronic or acute health problems (e.g. a heart condition, tuberculosis, rheumatic

fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, attention deficit disorder, attention deficit hyperactivity disorder, leukemia, or diabetes); and

(B) Adversely affects a child's educational performance.

See 34 §CFR 300.7(c).

The criteria for evaluation and for an eligibility determination for OHI are provided in OAR 581-015-0051(8):

(8) Other Health Impairment:

(a) If a child is suspected of having another health impairment, the following evaluation shall be conducted:

(A) medical statement or a health assessment statement, indicating a diagnosis of a health impairment or a description of the impairment, and a statement that the child's condition is permanent or is expected to last for more than 60 calendar days;

(B) Assessments to determine the impact of the suspected disability:

(i) On the child's educational performance for a school-age child; or

(ii) On the child's developmental progress for a preschool child; and

(C) Additional evaluations or assessments that are necessary to identify the child's educational needs.

(b) For a child suspected of having another health impairment, the child shall meet all of the minimum criteria:

(A) The child exhibits limited strength, vitality or alertness, including a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment;

(B) The child's limited strength, vitality or alertness is due to a chronic or acute health problem; and

(C) The child's condition is permanent or expected to last for more than 60 calendar days.

(c) For a child to be eligible for special education services as a child with another health impairment, the eligibility team shall determine that:

(A) The child's disability has an adverse impact on the child's educational performance; and

(B) The child needs special education services as a result of the disability.

T.A.'s Disability

T.A. has a chronic health problem ADHD which has lasted for more than 60 days. Due to ADHD T.A. has a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment. Because he is extremely distractible it is very difficult for him to remain focused on school work, in class or in other locations where he is doing school work, unless the material is of special interest to him or something else in the situation the personality or techniques of the instructor, for example enables him to concentrate.

The symptoms and functional limitations imposed by T.A.'s disability were readily apparent to Mr. and Ms. A. and A.A., who worked with him individually, and to his teachers at MBA, who saw T.A. in small classes and were well acquainted with ADHD. At FGHS Mr. Austin's predication that T.A. would get lost in a large classroom (where he would not draw attention because he would not be "acting out") was fulfilled. In some classes where the subject matter, instructor or style of instruction was particularly compelling (for example, Mr. Thompson's class at FGHS) T.A. could maintain his focus, as is typical of many students with ADHD. In other classes such as math and Spanish, which Dr. Fulop identified as particularly difficult for students with ADHD, T.A. had a particularly hard time.

T.A.'s Disability Has an Adverse Impact on His Educational Performance

T.A.'s disability adversely affects his educational performance by limiting his ability to keep track of, begin, concentrate on, complete and submit school assignments without frequent reminders and assistance.

The District asserts that because at FGHS T.A. had a C- average and was passing from grade to grade, was not a behavior problem, did not demonstrate stereotypical hyperactive behavior, and was "on task" when called on in certain classes his educational performance was not adversely affected by ADHD. *District's Post-Hearing Brief at 4-7, 10.* The District states, "[A]dverse impact exists only when a student is unable to access the regular education program; that is, when a student is not able to understand and participate in the regular classroom curriculum. Evidence of

such inability could be failing grades, achievement test scores indicating a lack of knowledge of the regular curriculum, or anecdotal information from the classroom teachers." *District's Post-Hearing Brief at 4.* But the District's argument ignores the enormous effort by T.A. and his family which made it possible for him to continue to progress with his grade. Furthermore, OAR 581-015-0053(3) states that a child shall be found eligible as a child with a disability under the criteria in OAR 581-015-0051 if the child has a disability and needs special education and related services, even though the child is advancing from grade to grade.

Ms. A. credibly described how, during T.A.'s years at FGHS, she spent hours on school nights and on weekends either helping T.A. with his specific assignments or redirecting his attention to his homework. She tried to teach T.A. how to read a book for information, to find the important points, to organize a paper. She sent e-mails and made visits to T.A.'s teachers to find out what he was supposed to be doing and whether he had done it. She collected T.A.'s assignments from his teachers when necessary and told a number of teachers and other staff members at FGHS of her concerns about T.A.'s academic performance.[28] T.A.'s father and his sister were involved to a lesser extent with assisting T.A. with his school work.

[28] Ms. A.'s testimony about her numerous contacts with T.A.'s teachers and other FGHS staff, in which she discussed T.A.'s difficulties and made efforts to help him keep abreast of his school work, was not refuted by the District. Nor was there any rebuttal of A.A.'s testimony about her communications with FGHS staff while she was tutoring T.A. Furthermore, although the District attempts to discount the parents' testimony as to the assistance they gave T.A., *see District's Closing Brief at 7-8*, I find their testimony credible and note that Ms. A. acknowledged that T.A. needed, and received, less help with his school

T.A.'s problem was not just that he could not get his homework done independently. He was consistently behind in his class work as well. Ms. A. recounted the allowances some of T.A.'s teachers made for him over the years to enable him to pass his classes by drawing a cartoon instead of passing a Spanish test; using a free period to catch up in Biology; and giving him (as well as many others) passing grades although he failed to submit a significant portion of his homework. FGHS also allowed T.A. (and other students) to turn a failing grade into a passing grade through credit recovery, but it took T.A. almost three times longer than other participants in the credit recovery class to complete his work. *Ex A28.*

Ms. Flick observed that many students at FGHS had difficulty getting their work done, and it appeared that the school was not seriously concerned about a student's achievement (or lack thereof) until he or she had earned at least three Fs in one grading period. *See Finding of Fact no. 115, above.* Ms. Flick explained the FGHS students' overall poor performance as related to the fact that many of the students spoke English as a second language, or came from poor families and had to work as well as attend school. But T.A. was not subject to these disadvantages. In addition, until T.A. began seriously abusing marijuana in Fall 2002 he had almost no social life outside school except with his family, and during his years at FGHS he almost never participated in extracurricular activities. His after school life, sometimes late into the night, was mostly devoted to doing school work, and he liked to learn and wanted to do well in school. T.A. was not unwilling, or too busy, to do

work in the Fall 2002 semester than in previous terms because his classes were less demanding. *Finding of Fact no. 44.*

his school work independently he was, due to his disability, unable.

T.A. Needs Special Education Services as a Result of His Disability

"Special education" means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability. "Specially designed instruction" means adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability; and to ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. OAR 581-015-005(30), (31), 34 CFR §300.26.

Due to T.A.'s ADHD and accompanying deficits in executive functioning it was extremely difficult for him to remain focused on material that was not intrinsically interesting. He did not understand how to find the significant points in a book. In addition he had major organizational problems, resulting in a failure to do school work, failure to submit work he had done, loss of school work, and duplication of assignments. He was able to pass from grade to grade only because of the extraordinary efforts of his family, especially Ms. A. to compensate for his deficits, and the accommodations offered by his teachers and FGHS which enabled him to get passing grades in most of his classes.

The District argues that "The sum total of the evidence will be that T.A.'s educational problems are not severe, in the context of the general education population at Forest Grove High School, and that there is no evidence that these problems time management,

organization, and work completion cannot be sufficiently addressed with the accommodations and assistance available to all regular education high school students." *District's Pre-Hearing Brief 12.* To the contrary the sum total of the evidence is that whatever "accommodations and assistance" were available to all regular education high school students at FGHS, and to the extent such "accommodations and assistance" were provided to T.A., they were inadequate to remedy T.A.'s deficiencies and relieve his family of the need to provide him with, in effect, daily special education services at home so that he could continue to pass from grade to grade in school.

The provision of specially designed instruction to a student with academic difficulties and achievements similar to those of T.A. was discussed in a recent complaint resolution decision by the Oregon Department of Education, *In the Matter of the Education of M.J. and The Dalles School District*, Final Order, Case No. 02-054-043 (December 30, 2002). The student, M.J., was found eligible for special education services in 1999, when he was in sixth grade, as a student with an OHI due to Tourette's. M.J. was a very bright student who for several years after he was identified as having an OHI was in danger of failing most of his academic classes, primarily because of not completing and returning assignments on time. Because of his impairment M.J. was to receive specially designed instruction and supportive services (described in an IEP) which were directed toward improving, and ameliorating the educational impact of, his weak organizational skills. *Final Order at 3.* M.J.'s eighth grade IEP (2001) provided for specially designed instruction in study skills for twenty minutes twice a week in the regular classroom. His annual IEP goal in study skills was to improve his

organizational skills such that he would be handing in completed assignments independently. The time allotted for instruction in study skills was temporarily decreased, but in November 2002 the IEP team increased M.J.'s specially designed instruction in study skills to 45 minutes per week, to be provided in the resource room. His IEPs described supplemental aids/services, modifications and accommodations related to achieving this goal.

Although M.J., unlike T.A., was found eligible for special education by his school district, he did not in fact receive the specially designed instruction required by his IEP. The distinction between services made available as needed to regular education students (which the District contends, in this case, were adequate for T.A.) and specially designed instruction for students with disabilities such as M.J. and T.A., is illustrated in this comment by the Department of Education in responding to the complaint filed by M.J.'s parent:

> Because organizational skills are an important focus for all students in the middle school, all of M.J.'s middle school teachers had various systems in place * * * to help keep all the students organized. * * *
>
> However, the Department did not find convincing evidence that District staff provided M.J. with specially designed instruction specifically directed toward helping him achieve independence in completing and turning in assignments. * * * So, although District staff provided a variety of accommodations and a generous amount of support to help M.J. catch up after he failed to turn in the assignments on time, they did not provide specially designed instruction that would allow

> him to progress toward independence in organizational skills.
>
> The same is true for the beginning of the 2002-2003 school year, until early November 2002, when M.J.'s special education teacher started using a specific instructional curriculum with M.J. that is directed toward improving organizational skills for students with disabilities. In addition, the special education teacher and M.J.'s parent instituted a new notebook system and a reward system designed to increase M.J.'s independence in keeping current with assignments.

Final Order at 14-15.

As illustrated in the case of M.J., the fact that assistance is available to all regular education students at a school, and with that assistance (and parental help) a student with a disability is passing his or her classes, does not automatically eliminate the need for specially designed instruction for the student.[29] As Ms. Flick acknowledged, even if a school district made specially designed instruction available to all students in the regular education setting, the District would still be required to identify children with disabilities under the IDEA. *Tr 437-38.* When a student is eligible for special education services and is in need of specially designed instruction, the school district must respond with an appropriate IEP. Two

[29] "M.J. was able to pass all of his classes, generally with a grade of C or better, despite the lack of specially designed instruction in organizational skills. The combination of M.J.'s strong academic skills, his parent's persistence in seeking out information about his status and getting extra help for him as each quarter ended, and his teachers' willingness to go the extra mile to get his assignments in at the end of the quarter resulted in M.J. passing all of his classes." *Final Order at 15.*

functions of the IEP are to identify the assistance an individual student needs and provide tools for measuring its success. OAR 581-015-0064, -0065. FGHS neither identified T.A.'s educational needs adequately nor provided appropriate resources for addressing them.

Like M.J. T.A. requires specially designed instruction to address his compromised organizational abilities, as well as other deficits related to his ADHD. Examples of the services which could be considered are those described in T.A.'s Student Action Plan at MBA; some of the methods and tools identified by Dr. Fulop, including the SQ4R method; one on one remedial instruction in certain areas and direct instruction in organization and time management, as suggested by Dr. Patchin; and the "specific instructional curriculum" directed toward improving organizational skills for students with disabilities which was provided to M.J. It is the responsibility of the District, and not T.A.'s parents, to provide T.A. with a FAPE, including the special education he requires as a result of his disability.[30]

[30] A student (Chad C.) who in many respects was quite similar to T.A. was described in *West Chester Area School District v. Bruce and Suzanne C.*, 36 *IDELR* 154 (ED Pa 2002). When Chad C., 14 years old, was in fourth grade, an evaluation disclosed that he had multiple symptoms of ADD including weaknesses in auditory memory, organizing skills and concentration. Throughout his school career his performance and placement varied, declining from seventh to ninth grade. But his grades ranged from As to Cs, and although he had previously been in more challenging classes, in ninth grade he was still placed in one or more Honors classes. The Court commented:

> * * * Chad's class placement and grades fail to tell the whole story. Throughout much of Chad's schooling, Chad's mother has worked with him on a daily basis, typically two

FGHS Assessments

The assessment of T.A. conducted by Mr. Martin and others in 2001 failed to address all areas of suspected disability (specifically, ADHD) and was therefore legally inadequate. In addition, the MDT in 2001 noted, but failed to follow up on, the possibility that T.A. might be eligible for services under Section 504.

The IDEA and Section 504 eligibility determinations in July and August 2003 came to the wrong conclusions, perhaps in part perhaps because some of the educators participating in the MDT meetings 1) were unfamiliar with the legal eligibility standards; 2) were given inaccurate information about those standards; 3) had stereotypical ideas of hyperactivity and were unaware of the recent reclassification of various forms of attention deficit as subtypes of ADHD[31]; 4) and did not consider relevant the effort required outside of school to enable T.A. to

> or three hours each school night plus additional time on the weekends, to ensure assignments were complete and Chad was prepared for tests. In an effort to enhance Chad's sense of independence, Chad's mother became less involved with his studies during his eighth grade year. Tellingly, without his mother's extensive efforts, Chad's grades dropped considerably.

36 *IDELR* 154, at 674. The Court concluded that in light of the totality of the evidence, including the extensive amount of time Chad spent out of class receiving remedial and supplemental assistance from his mother, and Chad's potential as evinced by the District's testing, he was entitled to an IEP.

[31] So that the diagnosis applied to T.A. although his main symptom was inattention and his hyperactivity consisted only of very subtle, constant movements of his hands and feet. *Testimony of Fulop.*

pass enough classes to move from grade to grade on schedule.

Reimbursement for Evaluation by Dr. Fulop

OAR 581-015-0094, addressing independent educational evaluations, provides, in relevant part:

> (1) A parent of a child with a disability or suspected disability has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the school district.
>
> (a) "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the school district responsible for the education of the child.
>
> (b) "Public expense" means that the school district either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent.
>
> * * * * *
>
> (4) If a parent requests an independent education evaluation at public expense, the school district shall, without unnecessary delay, either:
>
> (a) Ensure that an independent educational evaluation is provided at public expense unless the school district demonstrates in a hearing under OAR 581-015-0081 that the evaluation obtained by the parent did not meet school district criteria * * *; or
>
> (b) Initiate a due process hearing under OAR 581-015-0081 to show that its evaluation is appropriate.
>
> * * * * *

T.A.'s parents were clearly dissatisfied with the evaluation completed by Mr. Martin.[32] As indicated in the above rule, they had the option of asking that the District pay for Dr. Fulop's evaluation of T.A. and if the District refused, the District would have had to initiate a due process hearing to show that its evaluation was appropriate. Instead the parents arranged for the evaluation by Dr. Fulop without informing the District that it was taking place.

The parents, in their hearing request, did not seek reimbursement for the evaluation by Dr. Fulop. *See Ex C1.* This claim for reimbursement was not addressed in T.A.'s Pre-Hearing Brief. *See Brief at 9-11.* It was first presented in T.A.'s Closing Brief. *See Brief at 38-40.*[33]

Because this claim for reimbursement was not made before the hearing there is no evidence as to whether the Notice of Procedural Safeguards (Notice) distributed by the District in 2000 and 2001 advised Mr. and Ms. A. of the need to request in advance that the

[32] Mr. A. told Ms. Voigt in March 2003 that "Vinny" was "worthless." *See Ex A3.*

[33] *Cf Student's Pre-Hearing Brief at 10:* "The third issue has two components: (1) Were the programs secured by T.A.'s parents reasonably calculated to provide educational benefit to T.A. and (2) When considering all of the actions and inactions of both parties, did the parents do anything or fail to do something which makes it inequitable to reimburse them for costs they incurred?" and *T.A.'s Closing Brief at 39:* "The third issue has three components: (1) Should the cost of Dr. Fulop's evaluation be reimbursed; (2) Were the programs secured by T.A.'s parents reasonably calculated to provide educational benefit to T.A. and (3) When considering all of the actions and inactions of both parties, did the parents do anything or fail to do something which makes it inequitable to reimburse them for costs they incurred?"

District pay for an independent educational evaluation (IEE) as a condition of receiving reimbursement for Dr. Fulop's evaluation. If, as is more likely, that information was in the Notice, the parents failed to make such an advance request. Although the parents received the Notice long before they requested Dr. Fulop's evaluation, the information about IEEs was immediately and directly relevant in 2001 to their concern that Mr. Martin's evaluation was inadequate. If they read the Notice (which is doubtful, as they do not recall receiving it) they should have remembered this information, especially because their ability to get a private evaluation was limited by financial constraints.

As the parents did not follow the instructions in Notice, did not claim reimbursement for Dr. Fulop's evaluation until after the hearing, and did not present any convincing arguments that they are legally entitled to such reimbursement, *see T.A.'s Closing Brief at 39-40,* their request for reimbursement for Dr. Fulop's evaluation is denied.

Parental Placement: Notice Issues

OAR 581-015-0156 addresses reimbursement for private placement in some circumstances and provides, in relevant part:

> (1) If a private school child with a disability has available a free appropriate public education and the parents choose to place the child in a private school, the public agency is not required to pay for the cost of the child's education, including special education and related services, at the private school.
>
> * * *

(2) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child and the question of financial responsibility are subject to the due process procedures under OAR 581-015-0080 through 581-015-0096.

(3) *If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency,* enroll the child in a private preschool, elementary, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by public agencies.

(4) The cost of reimbursement described in paragraph (3) of this section may be reduced or denied if:

* * * * *

(b) At least ten business days (including any holidays that occur on a business day) prior to the removal of the child from the public school or ECSE program, the parents did not give written notice to the public agency of the information described in paragraph (4)(a) of this rule.

(5) The cost of reimbursement described in paragraph (3) of this section may also be reduced or denied if:

* * * * *

(b) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(6) Notwithstanding the notice requirement in paragraph (4), the cost of reimbursement may not be reduced or denied for failure to provide the notice if:

* * * * *

(d) The parents had not received notice of procedural safeguards under OAR 581-015-0079 informing them of this notice requirement.

(Emphasis added.) *See* 34 CFR §300.403(d).

OAR 581-015-0156 and 34 CFR §300.403 do not apply where, as in this case, a child has not received special education services before the parents request reimbursement for a unilateral placement. That situation was addressed by the United States Department of Education in a response to public comments about 34 CFR §300.403 at the time that regulation was proposed to be promulgated:

> Another commenter requested that the Department clarify that the provisions of § 300.403 (c), (d), and (e) apply only in situations in which the child previously has received special education and related services under the authority of a public agency. In other situations, where the child has not yet been provided special education and related services, the Department should recognize that hearing officers and courts still retain broad equitable powers to award relief, and will con-

> tinue to apply the reimbursement standard in *Burlington*.
>
> * * * * *
>
> As a commenter noted, hearing officers and courts retain their authority, recognized in *Burlington* and *Florence County School District Four v. Carter,* 510 U.S. 7 (1993) (*Carter*) to award "appropriate" relief if a public agency has failed to provide FAPE, including reimbursement and compensatory services, under section 615(i)(2)(B)(iii)[34] in instances in which the child has not yet received special education and related services. This authority is independent of their authority under section 612(a)(11)(C)(ii)[35] to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency.

64 *Federal Register* 12602 (March 12, 1999). Parents have an equitable right to reimbursement for the cost of providing an appropriate education when a school district has failed to offer a child a FAPE. The conduct of both parties must be reviewed to determine whether relief is appropriate. *W.G. and B.G. v. Board of Trustees of Target Range School District,* 960 F2d 1479 (9th Cir 1992).

As T.A. was not receiving special education services his parents had not received notification of their rights under the special education laws since T.A. was evaluated in 2001. At that time the parents had no plans to remove T.A. to a private school, so any information in the Notice regarding reimbursement

[34] *See* 20 USC § 1415(i)(2)(B)(iii).

[35] *See* 20 USC § 1412(a)(10)(C)(ii).

for private placements would have been irrelevant to their concerns. In addition the Notice provided by the District in 2000 or 2001 did not address their situation, as it stated such reimbursement would be available *only if a student was receiving special education* before the parental placement. Mr. and Ms. A. first learned that the District might be obligated to reimburse them for the cost of Freer and MBA when they consulted an attorney (initially on March 28, 2003). By that time T.A. had left Freer and was enrolled at MBA.

Mr. and Ms. A. in effect notified the District of their claim for reimbursement when they filed their hearing request on April 18, 2003, three weeks after they learned they might be entitled to such reimbursement. Three weeks is not an unreasonable amount of time for the parents to work with their attorney to determine what, if anything, they might do about T.A.'s situation. The District was aware no later than April 21, 2003 (when T.A. was disenrolled from the PCC program) of the parents' claims; this is not a situation in which the parents return years after enrolling their child in a private school and request compensation. Nothing in the timing of the parents' notice should cause their right to reimbursement to be limited.

Reimbursement for Freer

T.A. was sent to Freer due to substance abuse and oppositional behavior, after he binged on marijuana and ran away from home for several days. Although the stress and failures resulting from his untreated ADHD (as well as his ineffectively treated depression) may well have contributed to his substance abuse there is no indication that his ADHD was addressed in any way at Freer. Therefore, although the District did not

provide a FAPE for T.A., the placement at Freer was not appropriate to meet his educational needs and Mr. and Ms. A. are not entitled to reimbursement for that placement.

Reimbursement for MBA

–MBA was an Appropriate Placement

MBA was an appropriate placement for T.A. Forty percent or more of the students there had ADHD and the staff were well acquainted with T.A.'s disability. T.A. had a Student Action Plan which offered him special education. It gave the initial academic goal of developing self-management skills for ADHD, with requirements that he attend seminars on time management and study skills; that his teachers and mentors monitor his organization and time management and teach strategies in the classroom and the dormitory; and that his teachers model time management and organizational strategies. In addition, there were expectations that his teachers would use multimodality instruction to engage him in activities (for example, he was producing a video to meet a requirement in political science, and sculpting geometrical figures in a special education math class); help him prioritize, plan and estimate completion time for his assignments; set daily class goals; and provide other assistance. Many of his teachers consulted with Ms. Fairman for advice on how best to teach T.A., and she made suggestions and provided resources they could use in particular situations. Also, help was available through peer tutoring, although whether T.A. received tutoring is not known. Coaching at MBA included helping students break large tasks into smaller pieces and setting short-term goals skills which T.A. needed to benefit from his education.

That T.A.'s grades did not immediately and dramatically improve at MBA is not surprising and does not indicate the placement was inappropriate. First, as MBA expects students to participate in the emotional growth as well as the academic curriculum, T.A. probably missed some of his academic classes when they coincided with the emotional growth program. More important, at MBA T.A. no longer had the daily one on one support of his parents to keep him on task, assist him with completing his schoolwork and intervene with his teachers. Rather, he was in a much more appropriate situation, where T.A.'s education was provided by his teachers and he was being taught and coached to develop the skills he needed to be an independent student. It is unrealistic to assume that he could quickly acquire those skills.

–When Should Reimbursement Begin?

Mr. and Ms. A. do not claim that T.A. requires residential placement because that is the least restrictive environment in which he can receive an appropriate education. Their claim for reimbursement is based on the fact that the District failed to identify T.A. as OHI and offer him the special education services he requires. On this claim they prevail. They are entitled to reimbursement for T.A.'s education at MBA until the District offers T.A. a FAPE. The likelihood that, absent depression and marijuana abuse, T.A. would not have suffered the severe deterioration which ultimately led to his placement in a residential treatment program does not excuse or mitigate the failure of FGHS to provide T.A. with the FAPE mandated by law.

The District notes that in class T.A. was much like many other FGHS students his academic performance was similar to or better than that of many of his

classmates, and his behavior was consistently appropriate. *District's Post-Hearing Brief at 6.* That information is relevant to the remaining issue relating to reimbursement, which is when should the District have known T.A. was eligible for special education as OHI due to his ADHD.

The District argues that one reason T.A.'s parents are not entitled to reimbursement for MBA is that they consistently withheld information from school staff and prevented private service providers from communicating with school staff. If the parents were pursuing their initial claim that T.A. was eligible for services as a child with ED, that might be relevant in balancing the equities. Information about T.A.'s diagnoses of depression or dysthymia by Dr. Booth, Dr. Patchin and Dr. Fulop, as well as T.A.'s escalating use of marijuana, might have indicated to the FGHS staff that T.A. was experiencing emotional difficulties not readily apparent to his teachers. But as the parents have withdrawn that claim those concerns are not relevant.

Concerning OHI, and particularly T.A.'s ADHD, FGHS had ample information about T.A.'s struggles in school due to his disability beginning with his first semester at FGHS and his initial evaluation in 2001. In fact, the District could have had much additional information had the 2001 evaluation addressed the deficiencies indicated on the Referral. The information on the Referral would have caused Dr. Neill to evaluate T.A. for OHI at that time. The reference to "maybe ADD/ADHD" would have caused Dr. Callum to evaluate T.A. for that disability. The e-mail Ms. A. sent to Mr. Martin, Ms. Shofner and others in August 2001, requesting tutoring in math for T.A., was apparently ignored by FGHS staff. The reference in Mr.

Martin's note of September 2001 to "possible 504" was ignored by FGHS staff. Because of Mr. and Ms. A.'s frequent contacts many of T.A.'s teachers, as well as Ms. Kaufman, Ms. Shofner and Mr. Garlock, were aware of T.A.'s difficulties and the effort Ms. A. (and for a time, A.A.) was investing in helping T.A. keep track of and complete his class requirements. The District's failure to evaluate T.A. adequately from 2001 to the present militates against their claim that reimbursement should be denied.

The parents claim they are entitled to reimbursement from the beginning of T.A.'s enrollment at MBA. They argue that, even when the District had available (in addition to the school records) Dr. Fulop's report, a summary of Dr. Patchin's therapy and Dr. Patchin herself, and a description from Mr. and Ms. A. of everything the family had done to allow T.A. to progress in school, the District still found T.A. ineligible for services under the IDEA or Section 504 (at the meetings in July and August 2003), and consequently there is no (additional) detriment to the District in authorizing reimbursement for all of T.A.'s schooling at M.B.A., rather than reimbursement to begin after those decisions were made. *Student's Pre-Hearing Brief at 12.* In this particular case without suggesting it is a principle of general applicability that is an appropriate consideration in weighing the equities, as it appears that no amount of relevant information would cause the District to acknowledge the severity of T.A.'s disability and T.A.'s need for special education.

I conclude the District is responsible for reimbursing T.A.'s parents for the necessary costs of his education at MBA, including the admission ($50), interview ($1500) and linen ($275) fees, the monthly tuition

payments ($5200), and the "alumni services" fees ($5200 from March to May 2003) which were apparently required. The parents presented no evidence as to why MBA charged them over $300 for wilderness clothing (or that T.A. could not use the clothing after leaving MBA), or why there was a need for T.A. to have another psychological evaluation in April, costing $680. The parents shall not be reimbursed for the cost of the clothing and the evaluation.

Section 504 of the Rehabilitation Act of 1973

Regulations implementing section 504 are found at 34 CFR Part 104. 34 CFR §104.3 includes the following definitions:

> (j) Handicapped person
>
> (1) Handicapped persons means any person who
>
> (i) has a physical or mental impairment which substantially limits one or more major life activities,
>
> (ii) has a record of such an impairment, or
>
> (iii) is regarded as having such an impairment.
>
> (2) As used in paragraph (j)
>
> (1) of this section, the phrase:
>
> (i) Physical or mental impairment means
>
> (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive,

digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or

(B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) Major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. * * * * *.

* * * * *

(l) *Qualified handicapped person means:*

* * * * *

(2) *With respect to public* preschool elementary, *secondary*, or adult *educational services, a handicappped person*

(i) of an age during which nonhandicapped persons are provided such services,

(ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or

(iii) *to whom a state is required to provide a free appropriate public education under section 612 of the Education of the Handicapped Act [now the IDEA];* * * * * .

(Emphasis added.) *See* OAR 581-015-0109.

34 CFR §104.33 provides:

(a) General.

A *recipient that operates a public* elementary or *secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction*, regardless of the nature or severity of the person's handicap.

(b) *Appropriate education.*

(1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that

(i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and

(ii) are based upon adherence to procedures that satisfy the requirements of Secs. 104.34, 104.35, and 104.36.

(2) Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

* * * * *

(c) Free education * * * * *

(4) Placement of handicapped persons by parents. If a recipient has made available, in conformance with the requirements of this section and Sec. 104.34, a free appropriate public education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the

private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made a free appropriate public education available or otherwise regarding the question of financial responsibility are subject to the due process procedures of Sec. 104.36.

* * * * *

(Emphasis added.)

OAR 581-015-0109 provides:

(1) The parent or guardian of a qualified student with a disability under section 504 may file a written request for a hearing with the State Superintendent of Public Instruction with respect to actions regarding the identification, evaluation, provision of a free appropriate education, or education placement of the student with the disability under Section 504, which the parent or guardian alleges to be in violation of Section 504 of the Rehabilitation Act of 1973, Public Law 93-112, or any amendment thereof. In such event, the Superintendent shall conduct a hearing.

(2) The school district involved in the hearing shall be responsible for the costs of the hearing.

T.A. has an impairment, ADHD, which substantially limits his major life activity of learning. *See* 34 CFR §104.3(j). He is a qualified handicapped person under Section 504 because he is a student with a disability to whom the state is required to provide a FAPE under the IDEA. *See* 34 CFR §104.3(l). The District may meet the obligation to provide T.A. with a FAPE by implementation of an Individualized Edu-

cation Program (IEP) developed in accordance with the IDEA. *See* 34 CFR §104.33

ORDER

1. T.A. is eligible for special education services as a student with a disability under the IDEA in the area of Other Health Impaired.

2. T.A. is eligible for services under Section 504 as a qualified handicapped person.

3. Mr. and Ms. A. are not eligible to receive reimbursement from the District for the cost of the evaluation of T.A. by Dr. Fulop or for the services T.A. received at Freer.

4. The District shall reimburse the parents for the necessary costs incurred in sending T.A. to MBA until the District offers T.A. a FAPE. Those costs include the initial application and interview fees; linen fee; monthly tuition charges; and "alumni services" fees.

Betty Smith, Administrative Law Judge
Office of Administrative Hearings

APPEAL PROCEDURE

NOTICE TO ALL PARTIES: If you are dissatisfied with this Order you may, within 120 days after the mailing date on this Order, commence a nonjury civil action in any state court of competent jurisdiction, ORS 343.175, or in the United States District Court, 20 U.S.C. § 1415(e)(2). Failure to request review within the time allowed will result in LOSS OF YOUR RIGHT TO APPEAL FROM THIS ORDER.

ENTERED at Salem, Oregon this 26 day of January, 2003 with copies mailed to:

Darlene Hendrickson, Oregon Department of Education, Public Services Building, 255 Capitol St. NE, Salem, OR 97310-0203.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed June 5, 2008]

No. 05-35641
D.C. No. CV-04-00331-MO
District of Oregon, Portland

FOREST GROVE SCHOOL DISTRICT,
Plaintiff - Appellee,

v.

T.A.,
Defendant - Appellant.

ORDER

Before: RYMER, GRABER, and BEA, *Circuit Judges*.

Judges Graber and Bea have voted to deny the petition for panel rehearing, and Judge Rymer has voted to grant it. The panel has voted to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for panel rehearing and petition for rehearing en banc are DENIED.

APPENDIX E

FEDERAL STATUTES

20 U.S.C. § 1412. State eligibility

(a) In general

A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

* * * *

(10) Children in private schools

* * * *

(B) Children placed in, or referred to, private schools by public agencies

(i) In general

Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

(ii) Standards

In all cases described in clause (i), the State educational agency shall determine whether such schools and facilities meet standards that

apply to State educational agencies and local educational agencies and that children so served have all the rights the children would have if served by such agencies.

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

(i) In general

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) Limitation on reimbursement

The cost of reimbursement described in clause (ii) may be reduced or denied

(I) if—

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(iv) Exception

Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement

(I) shall not be reduced or denied for failure to provide such notice if

(aa) the school prevented the parent from providing such notice;

(bb) the parents had not received notice, pursuant to section 1415 of this title, of the notice requirement in clause (iii)(I); or

(cc) compliance with clause (iii)(I) would likely result in physical harm to the child; and

(II) may, in the discretion of a court or a hearing officer, not be reduced or denied for failure to provide such notice if

(aa) the parent is illiterate or cannot write in English; or

(bb) compliance with clause (iii)(I) would likely result in serious emotional harm to the child.

* * * *

20 U.S.C. § 1415. Procedural safeguards

* * * *

(i) Administrative procedures

(1) In general

(A) Decision made in hearing

A decision made in a hearing conducted pursuant to subsection (f) or (k) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) of this section and paragraph (2).

(B) Decision made at appeal

A decision made under subsection (g) of this section shall be final, except that any party may bring an action under paragraph (2).

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

(B) Limitation

The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this subchapter, in such time as the State law allows.

(C) Additional requirements

In any action brought under this paragraph, the court

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees

(A) In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees

(i) In general

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs

(I) to a prevailing party who is the parent of a child with a disability;

(II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose,

such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(ii) Rule of construction

Nothing in this subparagraph shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

(C) Determination of amount of attorneys' fees

Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services

(i) In general

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally

obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) IEP Team meetings

Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e) of this section.

(iii) Opportunity to resolve complaints

A meeting conducted pursuant to subsection (f)(1)(B)(i) of this section shall not be considered

(I) a meeting convened as a result of an administrative hearing or judicial action; or

(II) an administrative hearing or judicial action for purposes of this paragraph.

(E) Exception to prohibition on attorneys' fees and related costs

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees Except as provided in subparagraph (G), whenever the court finds that

(i) the parent, or the parent's attorney, during the course of the action or pro-

ceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the local educational agency the appropriate information in the notice of the complaint described in subsection (b)(7)(A) of this section,

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) Exception to reduction in amount of attorneys' fees

The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

* * * *

OPPOSITION BRIEF

114

(3)

No. 08-305

Supreme Court, U.S.
FILED
DEC 3 - 2008
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,
Petitioner,

v.

T.A.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MARY E. BROADHURST
MARY E. BROADHURST, P.C.
P.O. Box 11377
Eugene, OR 97440
(541) 686-8530

BONNIE I. ROBIN-VERGEER
Counsel of Record
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Counsel for Respondent

December 2008

QUESTION PRESENTED

Whether the Individuals with Disabilities Education Act permits an award of private-school tuition reimbursement as "appropriate relief" for a child with a disability who had been enrolled in public school but had not "previously received special education and related services under the authority of a public agency," 20 U.S.C. § 1412(a)(10)(C)(ii), when the reason the child had not previously received such services was that the school district wrongly determined that the child was ineligible for special education services and thus failed to make a free appropriate public education available to the child.

TABLE OF CONTENTS

Page

QUESTION PRESENTED. i

TABLE OF AUTHORITIES. iii

RESPONDENT'S BRIEF IN OPPOSITION. 1

STATEMENT OF THE CASE. 2

1. IDEA Statutory Scheme. 2

2. Factual Background. 6

3. Decisions Below. 12

REASONS FOR DENYING THE WRIT. 14

I. This Case Is a Poor Vehicle for Review of the Question Presented Because of Its Interlocutory Posture. 14

II. There Is No Split Among the Circuits on the Facts Presented Here, and the Court of Appeals' Decision Was Correct. 17

III. Petitioner's Spending Clause Argument Is Waived and, in Any Event, Meritless. 28

CONCLUSION. 30

TABLE OF AUTHORITIES

Page

CASES

American Construction Co. v. Jacksonville, Tampa & Key West Railway Co., 148 U.S. 372 (1893). 16

Arlington Central School District Board of Education v. Murphy, 548 U.S. 291 (2006). 24, 25, 28, 29

Barnes v. Gorman, 536 U.S. 181 (2002). 29

Berger v. Medina City School District, 348 F.3d 513 (6th Cir. 2003). 26

Board of Education of City School District of New York v. Tom F. ex rel. Gilbert F., No. 01-6845 (GBD), 2005 WL 22866 (S.D.N.Y. Jan. 4, 2005). 21

Board of Education of City School District of New York v. Tom F. ex rel. Gilbert F., 193 Fed. Appx. 26 (2d Cir. 2006), *aff'd by an equally divided Court*, 128 S. Ct. 1 (2007). 2

Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982). 3

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co., 389 U.S. 327 (1967). 16

D.L. ex rel. J.L. v. Springfield Board of Education, 536 F. Supp. 2d 534 (D.N.J. 2008). 22

Florence County School District Four v. Carter, 510 U.S. 7 (1993). 5, 24, 26

Frank G. v. Board of Education of Hyde Park Central School District, 459 F.3d 356 (2d Cir. 2006), *cert. denied*, 128 S. Ct. 436 (2007). 12, 21, 22, 24, 26

Greenland School District v. Amy N., 358 F.3d 150 (1st Cir. 2004). 2, 18, 19, 20, 21

Hamilton-Brown Shoe Co. v. Wolf Brothers, 240 U.S. 251 (1916). 16

J.S. ex rel. R.S. v. South Orange/Maplewood Board of Education, No. 06-3494 (FSH), 2008 WL 820181 (D.N.J. Mar. 26, 2008). 22, 26

Jackson v. Birmingham Board of Education, 544 U.S. 167 (2005). 30

M.C. v. Voluntown Board of Education, 226 F.3d 60 (2d Cir. 2000). 26

M.M. ex rel. C.M. v. School Board of Miami-Dade County, 437 F.3d 1085 (11th Cir. 2006). 22

Patricia P. v. Board of Education of Oak Park, 203 F.3d 462 (7th Cir. 2000). 26

Schoenfeld v. Parkway School District, 138 F.3d 379 (8th Cir. 1998). 26

School Committee of Town of Burlington v. Department of Education of Massachusetts, 471 U.S. 359 (1985). 4, 5, 24, 25, 27

United States v. Mead Corp., 533 U.S. 218 (2001). 25

United States v. United Foods, Inc.,
533 U.S. 405 (2001). 28

United States v. Virginia, 518 U.S. 515 (1996). 17

Virginia Military Institute v. United States,
508 U.S. 946 (1993). 16, 17

Winkelman v. Parma City School District,
550 U.S. 516 (2007). 23, 26, 28, 29

CONSTITUTION AND STATUTES

U.S. Const. Art. I, § 8, Cl. 1
(Spending Clause). 28, 29, 30

Individuals with Disabilities Education Act,
20 U.S.C. § 1400 et seq. 1

Pub. L. No. 105-17, 111 Stat. 37. . . . . 4, 5

20 U.S.C. § 1400(d)(1)(A). 2, 23

20 U.S.C. § 1401(9). 3

20 U.S.C. § 1401(14). 3

20 U.S.C. § 1401(26). 3

20 U.S.C. § 1401(29). 3

20 U.S.C. § 1406. 24

20 U.S.C. § 1412(a)(1)(A). 3, 29

20 U.S.C. § 1412(a)(3)(A). 3

20 U.S.C. § 1412(a)(10)(B)(i). 3

20 U.S.C. § 1412(a)(10)(C). 13, 23

20 U.S.C. § 1412(a)(10)(C)(i). 6

20 U.S.C. § 1412(a)(10)(C)(ii). . . . . *passim*
20 U.S.C. § 1412(a)(10)(C)(iii). 6, 19
20 U.S.C. § 1412(a)(10)(C)(iv). 6
20 U.S.C. § 1414(d). 3
20 U.S.C. § 1415(b)(6). 3
20 U.S.C. § 1415(f). 3
20 U.S.C. § 1415(g). 4
20 U.S.C. § 1415(i)(2). 4, 12
20 U.S.C. § 1415(i)(2)(C). 4, 13, 22, 23, 24
20 U.S.C. § 1415(i)(2)(C)(iii). 4, 5, 24, 29
28 U.S.C. § 1254. 16

REGULATIONS

64 Fed. Reg. 12406 (1999). 24
71 Fed. Reg. 46540 (2006). 25
34 C.F.R. § 300.111(c)(1). 20
34 C.F.R. § 300.8. 3
34 C.F.R. § 300.8(c)(9). 7

MISCELLANEOUS

Eugene Gressman et al., *Supreme Court Practice* § 4.18 (9th ed. 2007). 16

RESPONDENT'S BRIEF IN OPPOSITION

Forest Grove School District asks this Court to grant certiorari to address whether the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., as amended in 1997, categorically bars reimbursement for private school tuition if a child with a disability has not "previously received special education and related services under the authority of a public agency." 20 U.S.C. § 1412(a)(10)(C)(ii). The court of appeals found no such categorical bar to a tuition reimbursement award for respondent T.A. in this case and remanded for further proceedings.

Petitioner argues that this Court should grant certiorari to resolve a split in the circuits between the First Circuit, on the one hand, and the Second, Ninth, and Eleventh Circuits, on the other, regarding the construction of § 1412(a)(10)(C)(ii). This case is the wrong vehicle to address the question.

Certiorari is unwarranted here because there is as yet no judgment awarding respondent private tuition reimbursement. The court of appeals reversed both the district court's reading of the statute and its conclusion that the equities did not favor reimbursement, and it remanded for further proceedings. Now, on remand, the parties are arguing over whether T.A. even has a disability—a question the district court has not yet reached—as well as whether, if T.A. has a disability, his parents are entitled to tuition reimbursement under equitable principles. In short, there is no final judgment requiring reimbursement in this case. Granting review when the case is in such an interlocutory posture is contrary to the Court's certiorari practice, and no extraordinary circumstances exist that would justify a departure from that practice.

This case is the wrong vehicle for an additional reason: There is no circuit conflict with respect to the interpretation of § 1412(a)(10)(C)(ii) under the circumstances presented in this case. Here, unlike in *Greenland School District v. Amy N.*, 358 F.3d 150 (1st Cir. 2004), the lone circuit court ruling upon which petitioner relies—T.A.'s parents requested and were denied special education services for him. Not only did the First Circuit in *Greenland* not preclude reimbursement in these circumstances, but it affirmatively suggested that reimbursement may be appropriate. The facts of this case where the child with a disability was in public school all along, but the school district never developed an individualized education program for him or offered him special education services—are so unlike those in *Board of Education of City School District of New York v. Tom F. ex rel. Gilbert F.*, 193 Fed. Appx. 26 (2d Cir. 2006), *aff'd by an equally divided Court*, 128 S. Ct. 1 (2007), as to present a different statutory construction question altogether from the one the Court was unable to resolve in *Tom F.*

STATEMENT OF THE CASE

1. IDEA Statutory Scheme

Congress enacted IDEA "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A).[1] A free

[1] The numbering of IDEA's provisions has changed over time. Citations are to the current codification.

appropriate public education ("FAPE") means "special education and related services," provided "at public expense," which are tailored to "the unique needs" of the child with a disability by means of an "individualized educational program" ("IEP"). *Id.* § 1401(9), (14), (26), (29) (defining statutory terms); *see also id.* § 1414(d) (specifying IEP requirements); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181–82 (1982).

To accomplish its objectives, IDEA provides federal financial assistance to states that submit plans to the Department of Education ("DOE") implementing the Act's policies and procedures, including the requirement that states make "a free appropriate public education . . . available to all children with disabilities residing in the State." 20 U.S.C. § 1412(a)(1)(A). DOE regulations define thirteen categories of disabilities, including "specific learning disability" and "other health impairment" ("OHI") (which includes attention deficit hyperactivity disorder ("ADHD")). 34 C.F.R. § 300.8. Pursuant to the states' "child find" obligation, "[a]ll children with disabilities residing in the State" must be "identified, located, and evaluated." 20 U.S.C. § 1412(a)(3)(A). School districts unable to provide a child a FAPE in a public school setting may place the child in a private school or facility—at no cost to the parents as a means of implementing IDEA's requirements. *Id.* § 1412(a)(10)(B)(i).

IDEA affords procedural protections, including the right to a hearing, to parents dissatisfied with any matter relating to a school district's identification, evaluation, or placement of their child, or with the provision of a FAPE to the child. *Id.* § 1415(b)(6), (f), &

(g). Aggrieved parties may challenge administrative decisions in state or federal court. *Id.* § 1415(i)(2). In any such action, the court "shall grant such relief as the court determines is appropriate." *Id.* § 1415(i)(2)(C)(iii).

The 1997 IDEA amendments, Pub. L. No. 105-17, 111 Stat. 37, were enacted against the backdrop of key decisions by this Court regarding the power of courts to order private school tuition reimbursement as "appropriate" relief for parents who unilaterally place their child with a disability in private school when the public school district failed to offer the child a FAPE.

In 1985, the Court held in *School Committee of Town of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1985), that the Education of the Handicapped Act (IDEA's predecessor), in a provision identical in substance to the current 20 U.S.C. § 1415(i)(2)(C), "confer[red] broad discretion on the court" to order school authorities to reimburse parents for private school tuition when that private placement, rather than a proposed IEP, was appropriate. 471 U.S. at 369. The Court recognized that because a final decision on an IEP's appropriateness often comes after the school term has ended, "parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be an appropriate placement." *Id.* at 370. "If they choose the latter course," as "conscientious parents who have adequate means . . . normally would," *id.*, "it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school

officials." Such a result, the Court said, would deny "the child's right to a *free* appropriate public education." *Id.*

In *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), the Court reaffirmed judicial authority to order school officials to reimburse parents for private school expenses if such a placement, rather than a proposed IEP, is proper under the Act. *Id.* at 12–14. It admonished that public school officials wishing to avoid such reimbursement "can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice." *Id.* at 15.

The 1997 amendments to IDEA did not alter a court's authority to award "such relief as the court determines is appropriate," as construed by this Court in *Burlington* and *Carter*, but recodified that grant of authority. Pub. L. No. 105-17, § 1, 111 Stat. 92 (enacting IDEA § 615(i)(2)(B)(iii)) (now codified at 20 U.S.C. § 1415(i)(2)(C)(iii)). However, Congress added a provision concerning payment for private school education on which petitioner relies to avoid its reimbursement obligation here:

> (C) Payment for education of children enrolled in private schools without consent of or referral by the public agency
>
> (i) In general
>
> Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education

> available to the child and the parents elected to place the child in such private school or facility.
>
> (ii) Reimbursement for private school placement
>
> If the parents of a child with a disability, *who previously received special education and related services under the authority of a public agency,* enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

20 U.S.C. § 1412(a)(10)(C)(i)–(ii) (emphasis added). Conditions that would permit, but not require, a court to reduce or deny the reimbursement described in clause (ii) follow in clause (iii), subject to certain exceptions in clause (iv). *See id.* § 1412(a)(10)(C)(iii)–(iv).

2. Factual Background

This case arises out of the efforts of T.A.'s parents to obtain a FAPE for their son and reimbursement for private school tuition for the latter part of T.A.'s junior year and his full senior year in high school. The Forest Grove School District ("district") never found T.A. eligible for special education services and thus did not develop an IEP or offer him a FAPE. The following facts are drawn largely from the decision of the hearing officer, whose factual findings were accepted by the district court. Pet. App. 44a.

a. T.A. had attended public school in the district since kindergarten. His teachers noted repeatedly throughout the years that T.A. had trouble paying attention and completing his school work. *Id.* at 58a–59a, 60a–61a ¶¶ 1–2. T.A.'s difficulties increased when he entered Forest Grove High School ("FGHS") in September 2000. *Id.* at 59a. By that time, Ms. A. was spending at least two hours with him daily, and three to four hours, even half a day, on weekends, helping him complete homework assignments. *Id.* at 61a–62a ¶ 5. Mr. and Ms. A. engaged in extensive contacts with their son's teachers so that they could help T.A. to comprehend and keep track of his assignments at home. *Id.* at 64a–65a ¶¶ 12–14.

By December 2000, T.A. was behind in most of his classes. Ms. A. contacted the school counselor, Laurel Kaufman, who recommended that T.A. be evaluated for special education services, and T.A.'s parents agreed. *Id.* at 65a–66a ¶ 15. District staff notes from a Multidisciplinary Team ("MDT") meeting on January 16, 2001 include "Maybe ADD [attention deficit disorder] / ADHD [attention deficit hyperactivity disorder]?" *Id.* at 66a ¶ 16. MDT notes for February 13, 2001 reiterate "suspected ADHD." *Id.* at 67a ¶ 16. The FGHS school psychologist, Vinny Martin, however, saw no reason to evaluate T.A. for ADHD, and T.A. was evaluated only for a learning disability. *Id.* at 70a ¶ 21. The district's experts later agreed, however, that T.A. should have been evaluated separately for other health impairment or ADHD (which falls within the OHI disability category). *Id.* at 70a–71a ¶ 21; *see* 34 C.F.R. § 300.8(c)(9) (defining OHI).

In June 2001, the district found that T.A. did not have a learning disability and accordingly was ineligible for special education. Pet. App. 72a ¶ 26. Contrary to the assertions of the district court and the dissent in the court of appeals, T.A.'s mother did not agree with the district's assessment that T.A. was ineligible for special education services. *Id.* at 21a–22a (Rymer, J., dissenting); *id.* at 49a. Instead, Ms. A. agreed that her son did not have a learning disability and that he therefore did not "qualify for special education in the area of Learning Disabled." Appellee's Supplemental Excerpts of Record 14 (9th Cir.). T.A.'s parents were not informed of the school staff's suspicions that T.A. had ADHD. Pet. App. 3a. The Notice of Procedural Safeguards the parents received did not discuss substantive categories of disability, *see* Appellant's Supplemental Excerpts of Record 2–16 (9th Cir.), and T.A.'s mother had not even heard of the "other health impairment" disability category before the summer of 2003, Hearing Tr. 1220; thus, T.A.'s parents did not specifically request that T.A. be evaluated for OHI. Pet. App. 3a.

T.A.'s parents did not remain passive, however, in their efforts to secure educational assistance for their son. On August 30, 2001, Ms. A. sent an e-mail to Mr. Martin (the school psychologist), the FGHS learning disability specialist, and a pre-algebra teacher (whose class T.A. had failed the previous semester), imploring them to find a more effective method to teach T.A. Pet. App. 73a–74a ¶ 29; Due Process Hearing, Exh. B3a. The school did not respond. Pet. App. 74a ¶ 29. T.A. began his sophomore year in September 2001. His first progress report in math showed that he was not turning in work and that he was failing tests. *Id.* at 77a ¶ 37.

Ms. A. again contacted Mr. Martin, but he discouraged her, responding that T.A. could be referred for another evaluation (again, for a learning disability), "but it would be difficult to find him eligible." *Id.* at 77a–78a ¶ 37.

T.A.'s progress report in the fall of 2001 indicated that he was failing most of his classes. Because his mother was unable to provide all the help T.A. needed, his parents hired T.A.'s older sister in November 2001 to tutor him 10 hours per week, while Ms. A. continued to assist T.A. *Id.* at 78a ¶ 38. Nonetheless, T.A.'s grades plummeted during his years at FGHS, dropping from a GPA of 2.00 at the end of 8th grade to a 1.38 at the end of the first semester of 11th grade. *Id.* at 63a ¶ 10. T.A.'s parents continued to seek help from the school. Again, they contacted the school counselor, *id.* at 79a ¶ 40, and Ms. A. repeatedly communicated with her son's teachers and FGHS staff to discuss T.A.'s learning problems and to intervene to help T.A. keep up with his school work. *See, e.g.*, *id.* at 80a ¶ 41, 135a & n.28, 153a. As the hearing officer found, T.A. advanced from grade to grade at FGHS only because of the extraordinary efforts of his parents and sister, who "provided him with what was in effect special education at home." *Id.* at 59a; *see also id.* at 135a, 137a–138a.

By fall/winter of 2002, during his junior year, T.A. was still lagging behind in his school work, had become very depressed, and had begun to use marijuana to alleviate his depression. *Id.* at 86a ¶ 53. T.A.'s therapist referred him to Dr. Michael Fulop, a clinical psychologist, for an evaluation for emotional and learning disorders, ADHD, and depression. *Id.* at 95a ¶¶ 73–74. Dr. Fulop evaluated T.A. in January and February 2003, and on March 14, 2003, he diagnosed

T.A. with ADHD and a dysthymic disorder, a form of depression. *Id.* at 96a–97a ¶¶ 74, 76. He also diagnosed him with various learning problems, poor organizational skills, difficulties with memory and expression, math disorder, and cannabis abuse. *Id.* at 98a–99a ¶ 77. Dr. Fulop recommended that T.A. attend Mount Bachelor Academy ("MBA") to address his ADHD, depression, and drug issues. *Id.* at 99a–100a ¶ 80. He also recommended that T.A.'s school consider him for special education services based on ADHD, among other disorders, and he proposed extensive school accommodations. *Id.* at 100a n.81.

MBA is a residential school approved by Oregon to provide special education programs and services for children with disabilities. *Id.* at 105a–106a ¶ 90. T.A.'s parents followed Dr. Fulop's advice and enrolled their son there on March 24, 2003. *Id.* at 89a ¶ 58. They were not aware, before placing T.A. at MBA, that the district could be responsible for paying private school expenses. *Id.* at 89a–90a ¶ 61. On March 28, 2003, T.A.'s parents hired counsel, *id.*, and on April 18, 2003, requested a hearing seeking an order requiring the district to evaluate T.A. in all areas of suspected disability, including OHI. *Id.* at 113a ¶ 103.

The district again evaluated T.A. and again found him ineligible for special education services. *Id.* at 123a ¶ 124. With respect to OHI, the MDT acknowledged that T.A. had ADHD but determined that he did not qualify for special education because his disability had no adverse impact on his educational performance. *Id.* In considering whether T.A.'s disability had such an impact, district authorities spoke in terms of whether it had a "very severe, significant impact" and concluded

that the effect was "not severe enough." *Id.* One of the district's witnesses commented that IDEA was intended to serve only those students who had "tremendously significant disabilities." *Id.*

b. T.A.'s parents requested a due process hearing, which was conducted in September and October 2003. *Id.* at 56a–57a. The hearing officer found in a January 2004 decision that T.A. was a student with an OHI disability; that his disability had an adverse impact on his educational performance; that T.A. needed special education services; and that in refusing to provide T.A. those services, the district had failed to offer him a FAPE. *Id.* at 59a, 129a; *see also id.* at 133a–138a. The hearing officer found that MBA was an appropriate placement, *id.* at 150a, and that the three-week delay (from March to April 2003) before T.A.'s parents filed their hearing request was not unreasonable under the circumstances, *id.* at 149a, and she ordered the district to reimburse T.A.'s parents for their MBA expenses until the district offered T.A. a FAPE. *Id.* at 129a, 151a–154a. The hearing officer concluded that, with respect to T.A.'s ADHD, "FGHS had ample information about T.A.'s struggles in school due to his disability beginning with his first semester at FGHS and his initial evaluation in 2001" and that the district had received considerable additional information since then about T.A.'s educational difficulties and the effort his family was investing to help him keep track of and complete his class requirements. The district's failure to evaluate T.A. adequately from 2001 to the present, the hearing officer determined, "militate[d] against [its] claim that reimbursement should be denied." *Id.* at 152a–153a.

3. Decisions Below

a. Pursuant to 20 U.S.C. § 1415(i)(2), the school district filed an action in the U.S. District Court for the District of Oregon appealing the hearing officer's determination that T.A. was eligible for special education under IDEA and that his parents were entitled to tuition reimbursement. The district court did not address whether T.A. had a disability and was thus entitled to special education services and a FAPE. Instead, the district court held that 20 U.S.C. § 1412(a)(10)(C)(ii) barred reimbursement because "[t]he plainest reading of the statute is that *only* children who had previously received special education services from the District are . . . eligible for such tuition reimbursement." Pet. App. 48a–49a. Further, "[e]ven assuming that tuition reimbursement may be ordered in an extreme case" for a student not receiving special education services, the court held that the facts here did not "support such an exercise of equity." *Id.* at 53a.

b. A divided panel of the court of appeals reversed. The court agreed with the Second Circuit's decision in *Frank G. v. Board of Education of Hyde Park Central School District*, 459 F.3d 356, 367–76 (2d Cir. 2006), *cert. denied*, 128 S. Ct. 436 (2007), that the reference in 20 U.S.C. § 1412(a)(10)(C)(ii) to students "who previously received special education and related services" does "not create a categorical bar to recovery of private school reimbursement for all other students." Pet. App. 13a. As the court of appeals observed, "the express purpose of the IDEA is 'to ensure that *all* children with disabilities have available to them a free appropriate public education.'" *Id.* at 15a (citations omitted). Interpreting the 1997 IDEA amendments to prohibit

reimbursement to students who have not yet received special education and related services, the court reasoned, "runs contrary to this express purpose." *Id.*

In amending IDEA in 1997, the court explained, Congress "chose to specify in § 1412(a)(10)(C) the requirements and factors to be considered by district courts and hearing officers when deciding whether to award reimbursement to students who previously received special education and related services." *Id.* at 16a. For students such as T.A. who never received such services, the provisions of § 1412(a)(10)(C) "simply do not apply." For those students, the court concluded, reimbursement "may be sought only under principles of equity pursuant to § 1415(i)(2)(C)." *Id.*

The court of appeals likewise rejected the district court's alternative holding that under equitable principles, T.A.'s parents would not be entitled to tuition reimbursement even absent the alleged statutory bar. The court found that the district court had abused its discretion both in incorporating its erroneous statutory construction into its equitable analysis, *id.* at 17a–18a, and in applying the wrong legal standard when it asserted that, at best, "tuition reimbursement may be ordered in an *extreme case* for a student not receiving special education services." *Id.* at 18a. Accordingly, the court of appeals remanded for further proceedings, identifying several factors the district court should consider in determining whether to award tuition reimbursement. *Id.* at 18a–20a.

c. The case is now proceeding on remand in the district court. The parties are currently litigating both whether T.A. had a disability and thus was eligible for special education services in the first place and whether

his parents should be reimbursed for expenses at MBA under equitable principles. Neither of these issues is before this Court, but their determination will affect whether a final judgment will be entered in respondent's favor, awarding tuition reimbursement.

REASONS FOR DENYING THE WRIT

I. This Case Is a Poor Vehicle for Review of the Question Presented Because of Its Interlocutory Posture.

Far from serving as an "ideal vehicle," Pet. 11, for review of the question presented, this case is a particularly poor one. There is no judgment awarding respondent private tuition reimbursement and no extraordinary circumstances that would warrant a grant of certiorari when the case is in this interlocutory posture.

The court of appeals did not affirm an award of private-school tuition reimbursement. The district court had denied reimbursement. Rather, the court of appeals remanded the case to the district court to reconsider whether such an award would be appropriate under general equitable principles. Pet. App. 17a–20a. Proceedings on remand to the district court are now underway. The school district is pressing the district court to overturn the hearing officer's finding that T.A. had a disability and thus was entitled to special education services at all—an issue that the district court had not reached and that was not before the court of appeals. *Id.* at 11a n.8. The district court's resolution of the question of T.A.'s eligibility for special education services could preclude any reimbursement award here.

If the district court determines that T.A. had a disability, then it must decide whether equitable principles favor awarding his parents tuition reimbursement. In reversing the district court's equitable analysis, the court of appeals did not signal that the district court should grant reimbursement. Instead, the court of appeals instructed the district court to "consider all relevant factors in determining whether to grant reimbursement and the amount of reimbursement." *Id.* at 18a.

For example, the court of appeals emphasized that the district court would be "within its discretion to consider notice as a relevant factor in its reimbursement decision," *id.* at 20a, and that T.A.'s parents "did not notify the School District before removing T.A. from public school." *Id.* at 19a. The court noted, however, that even after the district was given "a reasonable opportunity" to evaluate T.A. and make a placement recommendation, it "still failed to recognize T.A. as disabled or to offer him a free appropriate education." *Id.* at 20a. Additionally, the court identified other factors for the district court's consideration, such as "the existence of other, more suitable placements, the effort expended by the parent[s] in securing alternative placements[,] and the general cooperative or uncooperative position of the school district." *Id.* The court stressed that it was "mindful" that the hearing officer found that T.A.'s parents sent him to MBA "not only because of his disabilities, but also for reasons unrelated to his disabilities (i.e., substance abuse and behavioral problems)," and admonished that "the district court would be acting within its discretion to consider that factor as well." *Id.* Although we believe that the equities favor reimbursing T.A.'s tuition expenses, there

is no way to know until proceedings on remand are resolved whether the district court ultimately will agree.

Although this Court has jurisdiction under 28 U.S.C. § 1254 to grant review, it seldom does so when a case is in such an interlocutory posture. "Ordinarily, in the certiorari context, 'this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.'" Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 280 (9th ed. 2007) (quoting *Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893)); *see also Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (because court of appeals remanded case, "it is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251, 258 (1916) (writ of certiorari not issued "until final decree" except in "extraordinary cases"). The posture of this case is anything but extraordinary. The court of appeals reversed the judgment of the district court on a legal statutory construction issue and remanded for further proceedings on the merits. On remand, the district court will determine whether to award tuition reimbursement to T.A.'s parents under equitable principles, subject to further review.

This case is an even less appropriate vehicle for immediate review than *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) ("*VMI*"), in which the Fourth Circuit had issued a final decision holding that Virginia's sponsorship of a military college only for men was unconstitutional, but the district court had yet to

rule on an appropriate remedy. The Court denied certiorari on the ground that the decision was not sufficiently final because the remedy had not yet been selected. *See id.* at 946 (Scalia, J.). The Court recognized that it would have an opportunity to review the decision regarding constitutionality, if necessary, following the remedial phase of the case, as, indeed, it later did. *Id.*; *see United States v. Virginia*, 518 U.S. 515 (1996). In this case, *both* the underlying determination regarding IDEA eligibility and the remedy are still being litigated below.

Respondent believes, of course, that he will prevail on the merits on remand. If he does, petitioner may appeal the district court's final judgment and ultimately petition this Court on the question presented here. *VMI*, 508 U.S. at 946 (Scalia, J.). If the question is as "important and recurring" as petitioner claims, Pet. 14, then there will be any number of future vehicles that will allow the Court to resolve it. Because of this case's interlocutory status, even if the Court were to disagree with our assessment below regarding whether the question presented is worthy of review, the Court should stay its hand and allow the case to run its course.

II. There Is No Split Among the Circuits on the Facts Presented Here, and the Court of Appeals' Decision Was Correct.

Petitioner argues that this Court should grant certiorari to address whether 20 U.S.C. § 1412(a)(10)(C)(ii) categorically bars reimbursement for private school tuition if the child with a disability has not previously received "special education and related services under the authority of a public agency." There

is no split in the circuits regarding that question under the circumstances presented in this case. Here, T.A.'s parents sought special education services from the school district while their child was enrolled in public school. Finding T.A. ineligible for such services, the school district never offered him a free appropriate public education before his parents placed him in a private school. *See supra* pp. 7–11. No circuit has denied the possibility of private-school tuition reimbursement under such circumstances. Indeed, this case differs from every other case construing § 1412(a)(10)(C)(ii) including *Tom F.*, in which the Court previously granted review where debate has focused on whether parents were obligated to give the school district's individualized educational program "a try" before unilaterally placing their child in private school if they hoped to recover their tuition expenses.

A. Contrary to petitioner's assertion, Pet. 12–13, the court of appeals' decision in this case does not conflict with that of the First Circuit, the first to construe 20 U.S.C. § 1412(a)(10)(C)(ii), in *Greenland School District v. Amy N.*, 358 F.3d 150 (1st Cir. 2004). Not only did *Greenland* not foreclose reimbursement under the circumstances presented in this case, but it affirmatively suggested just the opposite that reimbursement may be appropriate here.

In *Greenland*, the First Circuit held that parents who had unilaterally removed their child Katie from public school and placed her in private school without notice to the school district, without raising with school officials the issue of special education services, and without offering school authorities an opportunity to prepare an IEP, were not eligible for tuition

reimbursement. *Greenland*, 358 F.3d at 152–54, 160. Not only did Katie's parents fail to request that their child be evaluated for special education services while she attended public school, but they did not request an evaluation until *seven months after* they had unilaterally placed her in private school, *id.* at 153–54 a failure the court found particularly egregious given that Katie's mother was a special education teacher and administrator herself. *Id.* at 154. The First Circuit construed § 1412(a)(10)(C)(ii) to provide that "tuition reimbursement is only available for children who have previously received 'special education and related services' while in the public school system (*or perhaps those who at least timely requested such services while the child is in public school*)." *Id.* at 159–60 (footnotes omitted) (emphasis added); *see also id.* at 160 n.7 (noting that legislative history "suggests that Congress meant to include children who had requested but not yet received special needs services during their period in the public schools").

The First Circuit's interpretation would not foreclose tuition reimbursement for parents who, like T.A.'s, requested, but were denied, special education services while their child was in public school. As *Greenland* reasoned, the provisions of § 1412(a)(10)(C)(iii) "make clear Congress's intent that *before* parents place their child in private school, they must at least give notice to the school that special education is at issue." 358 F.3d at 160; *id.* at 161 ("The purpose of the notice requirement is to give public school districts the opportunity to provide [a] FAPE before a child leaves public school and enrolls in private school."). Indeed, in emphasizing that there was "no dispute that neither Katie's parents nor anyone else requested an

evaluation for Katie while she was at Greenland" and "also no dispute" that Katie was removed for reasons having "nothing to do" with whether she "was receiving [a] FAPE," *id.* at 160, the First Circuit strongly suggested that, by contrast, where parents requested but were denied special education services for their child with a disability, thus putting the availability of a FAPE in issue, reimbursement *would be* appropriate.

Petitioner's claim that T.A.'s case is like *Greenland* because in both cases "the parents failed to notify the school district of any issue regarding their child's alleged need for special education," Pet. 13, is simply wrong. Here, the district was given ample opportunity to develop an IEP for T.A. and offer him a FAPE: His parents requested an evaluation for special education services in 2001, when T.A. was a freshman. The district evaluated him for the wrong disability, did not develop an IEP, and denied T.A. the special education services he desperately needed. T.A.'s parents continued to contact school counselors, staff, and teachers requesting educational assistance for T.A. Those requests triggered no further evaluation of T.A. by the school, despite the state's "child find" obligation under IDEA, which requires the state to identify and evaluate any child who is merely "suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade." 34 C.F.R. § 300.111(c)(1). And even when T.A.'s parents formally requested yet *another* special education evaluation just three weeks after T.A. was placed in private school, the district again refused to find him eligible for services, leading the hearing officer to conclude that "it appears that no amount of relevant information would cause the District to acknowledge the

severity of T.A.'s disability and T.A.'s need for special education." Pet. App. 153a.

Greenland, then, does not hold that a child such as T.A., who requested but was denied special education services, must categorically be denied private-school tuition reimbursement under § 1412(a)(10)(C)(ii). The First Circuit's decision is not in conflict with the court of appeals' ruling here. Nor has any other circuit ruled that tuition reimbursement would be unavailable under these circumstances.

The facts of this case differ markedly from those of *Tom F.*, as well. In *Tom F.*, unlike here, the child with a disability, Gilbert F., had never attended public school. His parents placed him in private school when he was in kindergarten. *Bd. of Educ. of City Sch. Dist. of New York v. Tom F. ex rel. Gilbert F.*, No. 01-6845 (GBD), 2005 WL 22866, at *1 (S.D.N.Y. Jan. 4, 2005). The school district again, unlike here found that Gilbert had a learning disability and developed an IEP for him, proposing to place him in public school. Nonetheless, Gilbert's father rejected the IEP and continued his son's placement at the private school, requesting tuition reimbursement. *Id.* The district court determined that 20 U.S.C. § 1412(a)(10)(C)(ii) barred tuition reimbursement because the provision "ensure[d] that a parent's rejection of a public school placement is not based on mere speculation as to whether the recommended public school placement would have been inappropriate." *Tom F.*, 2005 WL 22866, at *3. And although the Second Circuit rejected that reasoning in *Frank G.*, its discussion likewise focused on whether parents must test a school district's proffered special education plan before seeking reimbursement for their

own unilateral private-school placement. 459 F.3d at 372.[2]

Here, however, the school district found T.A. ineligible for special education services and thus never developed an IEP or offered him a free appropriate public education before his parents placed him in a private school. Thus, in contrast to *Tom F.*, where the issue boiled down to whether the parents were required to give the school district's IEP "a try" before unilaterally placing their child with a disability in private school with the expectation of recovering tuition expenses, T.A. was offered nothing "to try." There is no conflict in the circuits on the question presented in this case, and no reason for the Court to review it.[3]

[2] Courts that have construed § 1412(a)(10)(C)(ii) since the Second Circuit's decision in *Frank G.*, including the court of appeals here, have agreed with the Second Circuit that the provision does not categorically bar tuition reimbursement when a school district has failed to make a FAPE available to a child with a disability. *See* Pet. App. 12a–17a; *D.L. ex rel. J.L. v. Springfield Bd. of Educ.*, 536 F. Supp. 2d 534, 538–43 (D.N.J. 2008); *J.S. ex rel. R.S. v. South Orange/Maplewood Bd. of Educ.*, No. 06-3494 (FSH), 2008 WL 820181, at *6 (D.N.J. Mar. 26, 2008). The Eleventh Circuit agrees as well. *M.M. ex rel. C.M. v. School Bd. of Miami-Dade County*, 437 F.3d 1085, 1098–99 (11th Cir. 2006). Thus, even in the factual scenario presented in *Tom F.*, where a school district has found a child eligible for services but developed an allegedly inadequate IEP, a consensus has begun to take shape in the lower courts that IDEA does *not* bar courts from exercising their equitable powers under § 1415(i)(2)(C) to award tuition reimbursement in appropriate circumstances, even when a child has not previously received public special education services.

[3] Only after the hearing officer ruled, and long after T.A.'s parents had been forced by the school district's inaction to place T.A. in a private school, did the district belatedly patch together a proposed

B. In any event, the court of appeals' construction of § 1412(a)(10)(C)(ii) in this case is correct. Preserving the possibility of private-school tuition reimbursement where a child's failure to receive special education services from a public agency is attributable to the school district's incorrect eligibility determination is consistent with both the text of the disputed provision and the Act as a whole. As the court recognized, "the express purpose of the IDEA is 'to ensure that *all* children with disabilities have available to them a free appropriate public education.'" Pet. App. 15a (quoting 20 U.S.C. § 1400(d)(1)(A)); *accord Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 127 S. Ct. 1994, 2004 (2007) ("free appropriate public education" is "central entitlement provided by IDEA"). Interpreting the 1997 amendments to prohibit reimbursement to students who have not yet received special education services "runs contrary to this express purpose." Pet. App. 15a. Rather than addressing reimbursement in circumstances in which a child with a disability has not previously received special education services, the court explained, "Congress chose to specify in § 1412(a)(10)(C) the requirements and factors to be considered by district courts and hearing officers when deciding whether to award reimbursement to students who previously received special education and related services." Pet. App. 16a. For students who never received such services, reimbursement "may be sought only under principles of equity pursuant to § 1415(i)(2)(C)." *Id.*; *see*

IEP, which relied primarily on placing T.A. in regular classes at FGHS after T.A.'s last semester of high school had already started. The adequacy of that IEP is not at issue in this litigation. In any event, T.A. could not have "tried out" an IEP that had not even been offered at the time his parents enrolled him in private school.

also Frank G., 459 F.3d at 367–76. In other words, the "previously received" language on which petitioner relies is a descriptive phrase, not a conditional one. Congress simply codified the reimbursement remedy in the situation in which that remedy had most commonly been sought (such as in *Burlington*, *Carter*, and their progeny).

Even if the disputed provision is ambiguous (though we believe that it is not), the interpretation by the Department of Education, the federal agency with rulemaking authority under IDEA, 20 U.S.C. § 1406, is entitled to *Chevron* deference. As the court of appeals recognized, DOE explicitly addressed the question presented here in commentary published in the Federal Register that accompanied the agency's final regulations implementing the 1997 amendments. DOE stated that hearing officers and courts retain their authority under § 1415(i)(2)(C)(iii) to award "appropriate" relief in the form of private tuition reimbursement if a public agency has failed to offer a FAPE to a child with a disability in instances in which the child has not yet received special education and related services. Pet. App. 14a–15a n.9 (citing 64 Fed. Reg. 12406, 12602 (1999)). This authority to award reimbursement under § 1415(i)(2)(C), DOE explained, "is independent of their authority under section 612(a)(10)(C)(ii) [20 U.S.C. § 1412(a)(10)(C)(ii)] to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency." *Id.*

Petitioner belittles DOE's 1999 interpretation because it was issued before this Court decided *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006). Pet. 18. But DOE

reaffirmed its statutory construction in 2006 *after Arlington* was decided—in formal comments that were published, following notice-and-comment rulemaking, with the agency's final regulations implementing the 2004 IDEA amendments. 71 Fed. Reg. 46540, 46599 (2006). Petitioner's dismissal of DOE's construction as having been offered "not in a regulation, but in commentary accompanying regulations," Pet. 18, is likewise without merit. As this Court has recognized, official agency interpretations of a statute that are formally adopted pursuant to notice-and-comment rulemaking, formal adjudication, or some other "relatively formal administrative procedure tending to foster . . . fairness and deliberation" are entitled to *Chevron* deference. *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001).[4]

Denying any opportunity for tuition reimbursement in the circumstances presented here would be particularly pointless. As explained above, it was the school district's own erroneous failure to find T.A. eligible for special education services that was responsible for T.A.'s not having received a FAPE. Permitting tuition reimbursement in these circumstances does not create an incentive for parents to place children with disabilities in private rather than public school. *See* Pet. 20. Parents who unilaterally place their children in private school "do so at their own financial risk," *Burlington*, 471 U.S. at 373–74, and "are entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under

[4] The Solicitor General defended DOE's interpretation of IDEA as amicus curiae supporting respondent in *Tom F.*

the Act." *Carter*, 510 U.S. at 15. Moreover, the availability of reimbursement is governed by equitable considerations. *Id.* at 16. Parents who fail to cooperate with school authorities, make their children available for evaluation, or give a school district the opportunity to offer a FAPE are routinely denied such a remedy. *See, e.g., Berger v. Medina City Sch. Dist.*, 348 F.3d 513 (6th Cir. 2003); *Patricia P. v. Bd. of Educ. of Oak Park*, 203 F.3d 462 (7th Cir. 2000); *M.C. v. Voluntown Bd. of Educ.*, 226 F.3d 60 (2d Cir. 2000); *Schoenfeld v. Parkway Sch. Dist.*, 138 F.3d 379 (8th Cir. 1998).

It is *petitioner's* interpretation of the statute that leads to absurd results which is reason alone to reject it. *See Winkelman*, 127 S. Ct. at 2004 (interpreting IDEA to avoid "incongruous results"). Although petitioner's reading of the statute produces several such results, *see Frank G.*, 459 F.3d at 372, *this case* furnishes the most dramatic illustration of the incongruous consequences of the school district's statutory construction. As the court of appeals recognized, "if the school district declined to recognize a student as disabled as occurred in this case the student would *never* receive special education in public school and therefore would *never* be eligible for reimbursement under § 1412(a)(10)(C)(ii)." Pet. App. 16a; *see also J.S.*, 2008 WL 820181, at *6 n.7 (if "parents were barred from bringing suit for tuition until the school district created an IEP, the school district would have no incentive to act at all," thereby "undermin[ing] IDEA's purpose").

It is no answer that IDEA's procedural protections "obviate any concern" that a child may be denied special education services. *See* Pet. 19–20. The review process takes far too long to produce the required special

education services if a school district insists on litigating the issue. The facts here underscore the point. More than five years have elapsed since T.A.'s parents requested a hearing and a second evaluation of T.A. in 2003 and the school district again found T.A. ineligible. One contested hearing and hearing officer order, one district court decision, one court of appeals decision, one petition for certiorari, and proceedings on remand later, and the parties are *still* litigating whether T.A. was disabled and thus eligible for special education services. T.A. has long since graduated from high school, and so his opportunity to obtain special education services from a public agency is over. No matter *what* the outcome of this litigation is, T.A. will *never* be in a position to have "previously received" special education services, and without tuition reimbursement, the school district's denial of a FAPE in this case will go unremedied.

Imagine, though, that T.A. was a kindergartner when his eligibility was denied. It is no stretch to envision that T.A. could go through all of elementary school without the district ever providing him special education services. Even if he eventually prevailed years later and obtained a judgment ordering the school district to provide him special education services, his right to tuition reimbursement, under petitioner's view, would be triggered only *after* he tried out those services years later and even then, only prospectively. If his parents tired of waiting for special education services and placed him in private school, they simply would be out of luck in securing reimbursement, under petitioner's reading of the Act. Yet nothing in the 1997 amendments or their legislative history demonstrates that Congress intended to overturn *Burlington*'s long-settled construction of courts' broad equitable powers

under the Act or that it meant to gut IDEA's central mission of ensuring that all children with disabilities are provided a FAPE.

III. Petitioner's Spending Clause Argument Is Waived and, in Any Event, Meritless.

Petitioner contends for the first time before this Court that the court of appeals' decision is at odds with the Spending Clause because IDEA was enacted pursuant to Congress's spending power, and, when Congress attaches conditions to a state's acceptance of federal funds, the conditions "must be set out 'unambiguously.'" *Arlington*, 548 U.S. at 296; *see* Pet. 14–20. Because petitioner failed to advance its Spending Clause argument below, and the court of appeals did not address it, the argument is waived. Moreover, there is no split in the circuits on the application of Spending Clause principles to the question presented here; indeed, no circuit has even considered it. This Court should decline to consider it in the first instance. *See United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001).

In any event, petitioner's invocation of the Spending Clause is without merit. The Court's analysis in *Winkelman*, dismissing a similar Spending Clause attack on IDEA's protections, firmly puts the matter to rest. In that case, the school district argued that because IDEA was, at best, ambiguous as to whether it accorded parents independent rights, the Act failed to provide "clear notice" of the condition to the states. 127 S. Ct. at 2006. In rejecting the argument, the Court clarified that the question to be answered is whether IDEA "furnishes clear notice regarding the liability at issue." *Id.* (quoting *Arlington*, 548 U.S. at 296). Although, in *Arlington*, the Court held that the Act did

not furnish such notice because the statute did not "even hint" that a state might be "responsible for reimbursing prevailing parents for services rendered by experts," 548 U.S. at 297, the parental-rights issue in *Winkelman* was different. As the Court explained in *Winkelman*, "[o]ur determination that IDEA grants to parents independent, enforceable rights does not impose any substantive condition or obligation on States they would not otherwise be required by law to observe." 127 S. Ct. at 2006.

Similarly, here, IDEA clearly imposes on states the *substantive* obligation to provide a free appropriate public education to "all children with disabilities residing in the State." 20 U.S.C. § 1412(a)(1)(A). Affording a remedy for the violation of that substantive condition here, the school district's failure to offer T.A. a FAPE merely enforces the Spending Clause contract. *See Barnes v. Gorman*, 536 U.S. 181, 189 (2002) ("When a federal-funds recipient violates conditions of Spending Clause legislation, the wrong done is the failure to provide what the contractual obligation requires; and that wrong is 'made good' when the recipient *compensates* . . . a third-party beneficiary . . . for the loss caused by that failure.").

The interpretation of IDEA by the Second, Ninth, and Eleventh Circuits that courts retain power to order a public school district to reimburse parents for private-school tuition where the district has denied their child a FAPE simply maintains the longstanding interpretation of courts' equitable powers under § 1415(i)(2)(C)(iii) adopted both by this Court and by the federal agency with regulatory authority on the subject. The states have been on clear notice for more than

twenty years that reimbursement of private-school tuition is available when a school district denies a FAPE to a child with a disability. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 182–84 (2005) (rejecting Spending Clause challenge when statute, case law, and regulations provided notice to states that Title IX prohibits retaliation). The Spending Clause affords petitioner no escape-hatch to avoid financial responsibility for its failure to fulfill IDEA's cardinal mandate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

BONNIE I. ROBIN-VERGEER
Counsel of Record
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

MARY E. BROADHURST
MARY E. BROADHURST, P.C.
P.O. Box 11377
Eugene, OR 97440
(541) 686-8530

Counsel for Respondent

December 2008

REPLY BRIEF

115

(4)

Supreme Court, U.S.
FILED
DEC 16 2008
OFFICE OF THE CLERK

No. 08-305

IN THE

Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,
Petitioner,

v.

T.A.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

EAMON P. JOYCE
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300

GARY FEINERMAN*
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

RYAN C. MORRIS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

RICHARD COHN-LEE
ANDREA L. HUNGERFORD
THE HUNGERFORD LAW FIRM, LLP
P.O. Box 3010
Oregon City, OR 97045
(503) 650-7990

Counsel for Petitioner

December 16, 2008

*Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
I. AS IN *TOM F.*, THE INTERLOCUTORY POSTURE OF THIS CASE PROVIDES NO BASIS TO DENY REVIEW	1
II. THE FACTS OF THIS CASE DIRECTLY IMPLICATE THE RECOGNIZED CIRCUIT SPLIT ON THE QUESTION PRESENTED	3
III. THE DISTRICT DID NOT FORFEIT ITS CONTENTION THAT THIS COURT'S SPENDING CLAUSE JURISPRUDENCE SUPPORTS ITS INTERPRETATION OF IDEA	7
CONCLUSION	11

TABLE OF AUTHORITIES

CASES Page

Altria Group, Inc. v. *Good*, No. 07-562, 555 U.S. (Dec. 15, 2008) 2
Arlington Cent. Sch. Dist. Bd. of Educ. v. *Murphy*, 548 U.S. 291 (2006) 7, 9
Bd. of Educ. v. *Tom F. ex rel. Gilbert F.*, No. 01-6845, 2005 WL 22866 (S.D.N.Y. Jan. 4, 2005), *vacated and remanded*, 193 F. App'x 26 (2d Cir. 2006), *aff'd by an equally divided court*, 127 S. Ct. 1 (2007) . 2
Bd. of Educ. v. *Tom F. ex rel. Gilbert F.*, 193 F. App'x 26 (2d Cir. 2006), *aff'd by an equally divided court*, 127 S. Ct. 1 (2007) . 3
Bd. of Educ. v. *Tom F. ex rel. Gilbert F.*, 127 S. Ct. 1393 (2007) 1, 3
Bridge v. *Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131 (2008) 2
Chevron, U.S.A., Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 9
Exxon Co., U.S.A. v. *Sofec, Inc.*, 517 U.S. 830 (1996) 6
Fed. Express Corp. v. *Holowecki*, 128 S. Ct. 1147 (2008) 2
Forest Grove Sch. Dist. v. *T.A.*, No. 3:04-cv-00331-MO (D. Or. Sept. 11, 2008) 3
Frank G. v. *Bd. of Educ.*, 459 F.3d 356 (2d Cir. 2006), *cert. denied* 128 S. Ct. 436 (2007) 4
Greenland Sch. Dist. v. *Amy N.*, 358 F.3d 150 (1st Cir. 2004) 3, 4, 6
Harris Trust & Sav. Bank v. *Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000) ... 7
Kontrick v. *Ryan*, 540 U.S. 443 (2004) 7
Ky. Ret. Sys. v. *EEOC*, 128 S. Ct. 2361 (2008) 2

TABLE OF AUTHORITIES continued

	Page
Lebron v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995)	8
M.M. ex rel. C.M. v. *Sch. Bd.*, 437 F.3d 1085 (11th Cir. 2006)	4
Sprint Commc'ns Co. v. *APCC Servs., Inc.*, 128 S. Ct. 2531 (2008)	2
Tellabs, Inc. v. *Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007)	2
U.S. Nat'l Bank of Or. v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439 (1993)	7
Winkelman v. *Parma City Sch. Dist.*, 127 S. Ct. 1994 (2007)	8, 9
Yee v. *Escondido*, 503 U.S. 519 (1992)	8

STATUTES AND REGULATIONS

20 U.S.C. § 1412(a)	*passim*
§ 1415	*passim*
Or. Rev. Stat. § 343.165(1)	5
34 C.F.R. § 300.510	10
§ 300.515(a)	10
§ 300.518	11
64 Fed. Reg. 12,406 (Mar. 12, 1999)	9

SCHOLARLY AUTHORITY

Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007)	2

REPLY BRIEF

T.A. does not deny that a circuit split exists on the question "whether 20 U.S.C. § 1412(a)(10)(C) creates a categorical bar to reimbursement of private school tuition for students who have not 'previously received special education and related services.'" Pet. App. 8a. Nor does T.A. dispute that the decision below, which sides with the Second and Eleventh Circuits and against the First Circuit in holding that there is no such categorical bar, deepened the conflict this Court granted certiorari to resolve in *Board of Education* v. *Tom F. ex rel. Gilbert F.*, 127 S. Ct. 1393 (2007). See Pet. 11-13. Finally, T.A. does not contest the submission of *amici* National School Boards Association, et al., that the question presented is extremely important to school districts across the Nation. See NSBA Br. 17-25.

T.A. contends, however, that "[t]his case is the wrong vehicle to address the question." Opp. 1. As shown below, each of the three grounds T.A. offers to support his contention is without merit. This case squarely presents the question left unresolved in *Tom F.*, and the need for this Court's review has not diminished over the past year. Accordingly, certiorari should be granted.

I. AS IN *TOM F.*, THE INTERLOCUTORY POSTURE OF THIS CASE PROVIDES NO BASIS TO DENY REVIEW.

T.A. first contends that review should be denied because the judgment below is interlocutory. Opp. 14-17. Quoting the Gressman treatise, T.A. asserts that "when a case is in * * * an interlocutory posture," this Court should not grant review "'unless it is necessary to prevent extraordinary inconvenience

and embarrassment in the conduct of the cause.'" *Id.* at 16 (quoting Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 280 (9th ed. 2007)).

T.A. is wrong. Two pages following the one T.A. quotes, the treatise notes that a case's interlocutory posture is "no impediment" to this Court's review where "the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." Gressman, *supra*, § 4.18, at 282 (citing *F. Hoffman-La Roche Ltd* v. *Empagran S.A.*, 542 U.S. 155 (2004); *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver*, 511 U.S. 164 (1994); *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462 (1977); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976)). This Court regularly reviews interlocutory judgments to resolve important issues of law fundamental or potentially dispositive to the case. See, *e.g.*, *Altria Group, Inc.* v. *Good*, No. 07-562, 555 U.S. (Dec. 15, 2008); *Sprint Commc'ns Co.* v. *APCC Servs., Inc.*, 128 S. Ct. 2531 (2008); *Ky. Ret. Sys.* v. *EEOC*, 128 S. Ct. 2361 (2008); *Bridge* v. *Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131 (2008); *Fed. Express Corp.* v. *Holowecki*, 128 S. Ct. 1147 (2008); *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007).

That is, in fact, precisely what happened in *Tom F.* The district court there, like the district court below, held that 20 U.S.C. § 1412(a)(10)(C)(ii) barred tuition reimbursement because the student, at the time he was unilaterally placed in private school, had not previously received special education services under the authority of a public agency. See *Bd. of Educ.* v. *Tom F. ex rel. Gilbert F.*, No. 01-6845, 2005 WL 22866, at *1, *4 (S.D.N.Y. Jan. 4, 2005). The Second Circuit, like the Ninth Circuit here, reversed and

remanded for further proceedings on the ground that § 1412(a)(10)(C)(ii) imposed no such bar. See 193 F. App'x 26 (2d Cir. 2006). Consistent with the above-cited cases, this Court granted certiorari despite the interlocutory posture of the Second Circuit's judgment. See 127 S. Ct. 1393 (2007).

The Court should do the same here. The Ninth Circuit reversed and remanded the district court's judgment on the ground that § 1412(a)(10)(C)(ii) does not deprive hearing officers and district courts of the equitable discretion under 20 U.S.C. § 1415(i)(2)(C) to award tuition reimbursement to T.A. and similarly situated students. Pet. App. 8a, 11a, 16a-18a. This litigation will terminate if this Court grants certiorari and takes the contrary view.[1] Given the importance of the question presented to this case and to IDEA litigation generally, see NSBA Br. 2-6, 17-25, the Court should grant review.

II. THE FACTS OF THIS CASE DIRECTLY IMPLICATE THE RECOGNIZED CIRCUIT SPLIT ON THE QUESTION PRESENTED.

It is beyond dispute that the circuits have split over whether 20 U.S.C. § 1412(a)(10)(C)(ii) categorically bars tuition reimbursement for students who, prior to their unilateral placement in private school, had not previously received special education services from a public agency. Pet. 11-13. In *Greenland School District* v. *Amy N.*, 358 F.3d 150, 159-60 (1st Cir.

[1] T.A.'s suggestion that the District is currently "pressing" alternative arguments in the district court (Opp. 14; *see also id.* at 1, 15) is incomplete to the point of being misleading. On remand from the Ninth Circuit, the District moved to stay proceedings pending this Court's disposition of the instant matter, but the motion was denied. *See* 3:04-cv-00331-MO (D. Or. Sept. 11, 2008) (Doc. No. 48).

2004), the First Circuit held that § 1412(a)(10)(C)(ii) imposes such a categorical bar. The Second and Eleventh Circuits have held otherwise. See *Frank G.* v. *Bd. of Educ.*, 459 F.3d 356, 367-76 (2d Cir. 2006), *cert. denied*, 128 S. Ct. 436 (2007); *M.M. ex rel. C.M.* v. *Sch. Bd.*, 437 F.3d 1085, 1098-99 (11th Cir. 2006) (per curiam).

Faced with this circuit conflict, the Ninth Circuit deferred its submission of this case pending this Court's disposition of *Frank G.* and *Tom F.* Pet. App. 7a. After *Frank G.* and *Tom F.* were disposed of without resolving the conflict, the Ninth Circuit proceeded to decision, "reject[ing] *Greenland* in favor of the Second Circuit's approach." Pet. App. 18a; see also *id.* at 13a ("adopt[ing] the analysis and conclusion of the Second Circuit").

T.A. does not deny that the circuits have interpreted § 1412(a)(10)(C)(ii) differently. He instead contends that the facts of this case do not implicate the split (Opp. 17-22), fastening upon a dictum from *Greenland* suggesting that tuition reimbursement would "perhaps" be available to a child who, while never having received special education services from a public agency, "at least timely requested such services while the child [wa]s in public school." 358 F.3d at 159-60. T.A. does not and could not assert that this dictum pertains to T.A.'s *2003* request for special education services, which occurred nearly a month after his unilateral enrollment in private school. Pet. App. 5a. T.A. maintains, however, that he requested a special education evaluation in 2001, while still in public school, and that the District improperly denied him special education services at that time. Opp. 20. From this premise, T.A. concludes that the First Circuit's interpretation of § 1412(a)(10)(C)(ii) in *Greenland* would not categori-

cally bar him from obtaining tuition reimbursement, and therefore that this case does not actually implicate the conflict identified and joined by the Ninth Circuit.

The Ninth Circuit, of course, took a different view of this case. After all, if the Ninth Circuit believed *Greenland* did not bar T.A. from obtaining tuition reimbursement, it would not have expressly rejected *Greenland*, and would not have deferred submission of the case pending this Court's review of two Second Circuit cases (*Frank G.* and *Tom F.*) that conflicted with *Greenland*. On the question whether its own decision can be reconciled with *Greenland*, the Ninth Circuit is right and T.A. is wrong. The reason is that the District's 2001 denial of special education services is not relevant to the question presented by this case.

This is clear from the record. As the courts below and the hearing officer found, T.A.'s parents never challenged, and T.A.'s mother agreed with, the District's 2001 determination that T.A. was ineligible for special education services. Pet. App. 3a, 27a, 39a n.3, 49a, 51a, 72a; see generally Or. Rev. Stat. § 343.165(1)(a) ("[a] hearing shall be conducted * * * if: The parent requests a hearing to contest the determination of the school district"); 20 U.S.C. § 1415(b). T.A. thus long ago forfeited any claims arising from the 2001 determination. Pet. App. 39a n.3 (district court noting that the "2001 evaluation was not an appropriate subject for the 2003 due process hearing"). Indeed, T.A. admitted below that the statute of limitations bars him from bringing any claims based on the 2001 determination. See Appellant's Opening Br. at *28-29, No. 05-35641, 2005 WL 4238965 (filed 9th Cir. Oct. 31, 2005).

T.A.'s parents did not pursue or request any other special education evaluation while T.A. remained in

public school. Pet. App. 27a-28a, 49a. Given this, the district court found that "[t]here was no notice to the school system prior to T.A.'s removal from Forest Grove High School in 2003 that T.A.'s parents felt that T.A. was in need of special education. The District had no opportunity to address special education issues within the public school setting." *Id.* at 49a; see also *id.* at 51a ("T.A.'s parents did not inform the District that special education services were at issue prior to T.A.'s parents withdrawing him from public school"). T.A. challenged this finding on appeal, suggesting that the 2001 evaluation provided such notice to the District prior to his unilateral withdrawal from public school, see Appellant's Br., *supra*, at *27, but the Ninth Circuit did not disturb the finding. Pet. App. 19a ("In this case, T.A.'s parents did not notify the School District before removing T.A. from public school."). Thus, the Ninth Circuit's holding that § 1412(a)(10)(C)(ii) does not categorically bar T.A. from receiving tuition reimbursement clearly conflicts with the First Circuit's holding that "*before* parents place their child in private school, they must at least give notice to the school that special education is at issue." *Greenland*, 358 F.3d at 160.

As this case comes to the Court, then, the only relevant special education evaluation the only evaluation resulting in a denial of special education services that T.A.'s parents challenged under the procedures available under Oregon law and IDEA took place in 2003, after T.A. unilaterally enrolled in private school. T.A. may not question here this common premise of both the district court's and the Ninth Circuit's opinions. See *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 840-41 (1996). It necessarily follows that the facts of this case do not bring

T.A. within the *Greenland* dictum, and therefore that the Ninth Circuit correctly understood that its decision could not be reconciled with *Greenland*. The dispositive issue in both cases, which the courts resolved differently, is whether § 1412(a)(10)(C)(ii) bars tuition reimbursement for students who did not receive special education services from a public agency prior to being unilaterally placed in private school.

III. THE DISTRICT DID NOT FORFEIT ITS CONTENTION THAT THIS COURT'S SPENDING CLAUSE JURISPRUDENCE SUPPORTS ITS INTERPRETATION OF IDEA.

A. In addition to noting a split on the question presented, the District demonstrated that its interpretation of 20 U.S.C. § 1412(a)(10)(C)(ii) finds support from *Arlington Central School District Board of Education* v. *Murphy*, 548 U.S. 291 (2006), which held that IDEA is a Spending Clause statute and therefore subject to the "clear notice" rule. Pet. 14-20. T.A. maintains that the District "waived" the proper term is "forfeited," see *Kontrick* v. *Ryan*, 540 U.S. 443, 458 n.13 (2004) its Spending Clause argument by not raising it in the Ninth Circuit. Opp. 28. But forfeiture applies to issue and claims, not to arguments made in support of issues and claims. "[W]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties." *U.S. Nat'l Bank of Or.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993) (internal quotation marks omitted); see also *Harris Trust & Sav. Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000).

Both here and below, the District has advanced the same claim: § 1412(a)(10)(C)(ii) categorically bars

tuition reimbursement to students like T.A. Pet. App. 11a-18a, 44a. Settled precedent permits the District to present new arguments and case law, including its Spending Clause argument and *Arlington*, to support that claim in this Court. See *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Lebron's contention that Amtrak is part of the Government is in our view not a new claim * * *, but a new argument to support what has been his consistent claim: that Amtrak did not accord him the rights it was obliged to provide by the First Amendment."); *Yee* v. *Escondido*, 503 U.S. 519, 535 (1992) (because petitioners "raised a taking claim in the state courts," they "could have formulated any argument they liked in support of that claim here").

B. T.A. also contends that the District's interpretation of § 1412(a)(10)(C)(ii) is mistaken. See Opp. 23-30. Because this case implicates the circuit conflict on the question presented, T.A.'s merits arguments provide no basis to deny review. It nonetheless bears mention that his arguments are flawed.

T.A. maintains that the District's Spending Clause argument cannot be reconciled with *Winkelman ex rel. Winkelman* v. *Parma City School District*, 127 S. Ct. 1994, 2006 (2007), which holds that the "clear notice" rule applies only to statutes that impose a "substantive condition or obligation on States." See Opp. 28-29. But § 1412(a)(10)(C) *does* impose a substantive condition on the States a tuition reimbursement obligation under defined circumstances and is included among "the * * * conditions" that States must satisfy to obtain federal funds. 20 U.S.C. § 1412(a). Section 1412(a)(10)(C) therefore is unlike the IDEA provision examined in *Winkelman*, which afforded parents the right to appeal unrepresented by counsel. The provision in *Winkelman* did not

"expand[]" the "basic measure of monetary recovery," 127 S. Ct. at 2006, while § 1412(a)(10)(C) plainly does.

T.A. also argues that the Department of Education's 1999 and 2006 interpretations of § 1412(a)(10)(C) warrant deference. See Opp. 24-25. But deference does not apply where, as here, governing interpretive principles leave only one permissible way to interpret a statute. See *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Under Spending Clause cases like *Arlington*, a statute that does not clearly notify a State of a condition for receiving federal funds cannot be interpreted to impose such a condition. 548 U.S. at 296. Following enactment of § 1412(a)(10)(C) in 1997, IDEA cannot be said to clearly notify state and local school authorities of the need to provide tuition reimbursement to students who do not receive special education services from a public agency prior to their unilateral placement in private school. Pet. 15-16. Given this, there is only one permissible way to interpret § 1412(a)(10)(C) to prohibit tuition reimbursement under those circumstances. It follows that the Department's contrary interpretation deserves no deference.

The Department's interpretation of IDEA suffers from a further embarrassment. According to the Department, after Congress's enactment of § 1412(a)(10)(C) in 1997, "*hearing officers* * * * retain[ed] their authority * * * to award * * * reimbursement and compensatory services" under § 1415(i)(2)(C) where "the child has not yet received special education and related services." 64 Fed. Reg. 12,406, 12,602 (Mar. 12, 1999) (emphasis added), *quoted in* Pet. App. 14a-15a n.9. The trouble with the Department's interpretation is that § 1415(i)(2)(C)

provides "the court" not the hearing officer with authority to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C). Section 1412(a)(10)(C)(ii), by contrast, speaks to the authority of "a court *or* hearing officer" to order tuition reimbursement. *Id.* § 1412(a)(10)(C)(ii) (emphasis added). Accordingly, even if § 1415(i)(2)(C) was properly understood before 1997 to grant hearing officers the authority to order tuition reimbursement to students like T.A., it could no longer be so understood after Congress enacted § 1412(a)(10)(C).

Finally, T.A. belittles IDEA's procedural protections in an effort to show that the Department's interpretation of § 1412(a)(10)(C) is absurd. Opp. 26-27. T.A.'s complaint about the length of the review process rings hollow given his *post hoc* request for special education services in 2003 and failure to pursue review of the District's denial of such services in 2001. Moreover, as *amici* note, IDEA establishes tight deadlines to ensure prompt resolution of disputes between parents and school districts. NSBA Br. 15-17. For instance, the district must schedule a resolution meeting within 15 days of any complaint, 34 C.F.R. § 300.510(a), and a hearing must occur within 30 days if there is no resolution, *id.* § 300.510(b). An administrative law judge must then issue a decision within 45 days of the expiration of the 30-day time period, unless that deadline is waived. *Id.* §§ 300.515(a), 300.510(c). That tuition reimbursement is barred during that timeframe for students who unilaterally withdraw from public school reflects the balance Congress crafted between

the costs and benefits of IDEA, and can hardly be deemed absurd.[2]

CONCLUSION

For the foregoing reasons and those stated in this petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

EAMON P. JOYCE
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300

GARY FEINERMAN*
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

RYAN C. MORRIS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

RICHARD COHN-LEE
ANDREA L. HUNGERFORD
THE HUNGERFORD LAW FIRM, LLP
P.O. Box 3010
Oregon City, OR 97045
(503) 650-7990

Counsel for Petitioner

December 16, 2008

*Counsel of Record

[2] Indeed, even though T.A. waived the 45-day deadline for an ALJ determination, T.A.'s due process hearing commenced within one month, and concluded within six months, of his parents' 2003 request for a special education evaluation. Pet. App. 56a-57a. After the hearing officer declared T.A. eligible for special education services, T.A.'s private school became the "stay-put" placement, which had the effect of obligating the District to pay T.A.'s tuition from that point through his high school graduation. *See generally* 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
OCT 6 - 2008
OFFICE OF THE CLERK

107

No. 08-305

IN THE

Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,

Petitioner,

v.

T.A.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS AND NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION IN SUPPORT OF PETITIONER

FRANCISCO M. NEGRÓN, JR.
GENERAL COUNSEL
NAOMI GITTINS
THOMAS E.M. HUTTON
LISA E. SORONEN
NAT'L SCH. BDS. ASS'N
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

MAREE F. SNEED*
JOHN W. BORKOWSKI
AUDREY J. ANDERSON
STEPHANIE J. GOLD
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6416

* Counsel of Record

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST OF AMICI CURIAE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. BY EXEMPTING PARENTS OF CHILDREN WHO NEVER RECEIVE PUBLIC SPECIAL EDUCATION SERVICES FROM THE LAW'S CAREFULLY IMPOSED CONDITIONS ON TUITION REIMBURSEMENT, THE NINTH CIRCUIT DECISION CONTRAVENES THE COLLABORATIVE INTENT AND FRAMEWORK OF IDEA 7

A. IDEA's History and Fundamental Requirements Show that Appropriate *Public* School Placements Are Preferred 9

B. IDEA Establishes a Collaborative Framework for Parents and Public Schools to Work in Tandem to Ensure Appropriate Educational Programs for Children with Disabilities 11

TABLE OF CONTENTS—Continued

Page

C. IDEA Provides Numerous Procedural Protections to Parents, Students and School Districts in an Effort to Balance the Costs and Benefits of IDEA 15

II. THE NINTH CIRCUIT'S RULING PROVIDES UNFAIR LITIGATION ADVANTAGES TO PARENTS WHO NEVER WORK WITH THE SCHOOL DISTRICT AND CREATES BUDGETING UNCERTAINTY FOR SCHOOL DISTRICTS 17

A. School Districts Are Substantially Limited in their Ability to Demonstrate That They Provided FAPE If They Never Have the Opportunity to Provide Special Education Services to a Student 17

B. School Districts Are Unable to Accurately Budget for Special Education Services When They May Be Required to Pay for Unilateral Private Placements for Students who Never Received Special Education Services 20

TABLE OF CONTENTS—Continued

Page

III. PERMITTING REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENTS MADE BEFORE THE CHILD EVER RECEIVES SPECIAL EDUCATION SERVICES FROM A PUBLIC SCHOOL WOULD INCREASE LITIGATION COSTS AND DIVERT RESOURCES FROM EDUCATION 22

A. Litigation Costs Under IDEA Are High 22

B. The Ninth Circuit's Decision Will Encourage Litigation 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES:

Arlington Cent. Sch. Dist. Bd. of Educ. v. *Murphy*, 126 S. Ct. 2455 (2006) 3

Board of Educ. v. *Tom F. ex rel. Gilbert F.*, 128 S. Ct. 1 (2007) 3, 4

Board of Educ. v. *Rowley*, 458 U.S. 176 (1982) 9, 11

Burlington Sch. Comm. v. *Department of Educ.*, 471 U.S. 359 (1985) 24, 25

Florence County Sch. Dist. Four v. *Carter*, 510 U.S. 7 (1993) 24, 25

Greenland Sch. Dist. v. *Amy N.*, 358 F.3d 150 (1st Cir. 2004) 5

Forest Grove Sch. Dist. v. *T.A.*, 523 F.3d 1078 (9th Cir. 2008) .....*passim*

Hessler ex rel. Britt v. *State Bd. of Educ.*, 700 F.2d 134 (4th Cir. 1983) 10

Honig v. *Doe*, 484 U.S. 305 (1988) 11

Independent Sch. Dist. No. 283 v. *S.D.*, 88 F.3d 556 (8th Cir. 1996) 10

Justin G. ex rel. Gene R. v. *Board of Educ. of Mont. Co.*, 148 F. Supp. 2d 576 (D. Md. 2001) 19

TABLE OF AUTHORITIES—Continued

Page

M.C. on behalf of J.C. v. *Central Reg'l Sch. Dist.*, 81 F.3d 389 (3d Cir. 1996) 18

M.S. v. *Mullica Twp. Bd. of Educ.*, No. 06-533, 2007 WL 1096804 (D.N.J. Apr. 12, 2007), *aff'd*, 263 F. App'x. 264 (3d Cir. 2008) 13

Schaffer ex rel. Schaffer v. *Weast*, 126 S. Ct. 528 (2005) 3, 9, 11

T.F. v. *Special Sch. Dist. of St. Louis County*, 449 F.3d 816 (8th Cir. 2006) 18

STATUTES:

20 U.S.C. §§ 1400 *et seq.* 3

20 U.S.C. § 1400(c)(2) 9

20 U.S.C. § 1400(d)(1)(A) 15

20 U.S.C. § 1412(a)(5) 10, 15

20 U.S.C. § 1412(a)(10)(C) 5, 20, 21

20 U.S.C. § 1412(a)(10)(C)(ii) 6, 7, 15, 25

20 U.S.C. § 1412(a)(10)(C)(iii) 8

20 U.S.C. § 1412(a)(10)(C)(iii)(I) 13, 16

20 U.S.C. § 1414(d) 11

TABLE OF AUTHORITIES—Continued

Page

20 U.S.C. § 1414(d)(3-4) 12

20 U.S.C. § 1415(b)(6)(B) 24

20 U.S.C. § 1415(b)(7)(A) 24

20 U.S.C. § 1415(c)(2)(B)(i)(I) 15

20 U.S.C. § 1415(e) 16, 24

20 U.S.C. § 1415(f)(1)(B) 16

20 U.S.C. § 1415(i)(3)(B) 24

RULES:

Sup. Ct. R. 37.2 2

Sup. Ct. R. 37.6 2

REGULATIONS:

34 C.F.R. § 300.148(d) 13, 16

LEGISLATIVE

H.R. Rep. No. 94-332 (1975) 9

H.R. Rep. No. 108-77 (2003) 24

S. Rep. No. 104-275 (1996) 23

OTHER AUTHORITIES:

Melanie Asmar, *Special Education Costs Soar; Unpredictable Bill Can Strain*

TABLE OF AUTHORITIES—Continued

Page

Local Districts, Concord Monitor, Feb. 17, 2008 21

Jay G. Chambers, *et al.*, American Institutes for Research, *What Are We Spending on Procedural Safeguards in Special Education, 1999-2000, Report 4* (May 2003) 22, 23, 24

Jay G. Chambers, *et al.*, American Institutes for Research, *What Are We Spending on Special Education Services in the United States, 1999-2000, Report 1* (June 2004) 4

Ann Lordeman, *Individuals with Disabiltiies Education Act (IDEA): Current Funding Trends*, CRS Report for Congress (April 11, 2008) 4

Meaghan M. McDermott, *Special Ed*, Rochester Democrat and Chronicle, Dec. 2, 2007 21

U.S. Dep't of Educ., *Twenty-fourth Annual Report to Congress on the Implementation of IDEA* (2002) 23, 24

U.S. Dep't of Educ., IDEA data, Table 2-5 ..... 14, 23

IN THE

Supreme Court of the United States

No. 08-305

FOREST GROVE SCHOOL DISTRICT,

Petitioner,

v.

T.A.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF AMICI CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS AND NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICI CURIAE[1]

The National School Boards Association ("NSBA") is a federation of state associations of school boards from throughout the United States, the Hawaii State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA represents over 95,000 of the Nation's school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 49.3 million public school students, or approximately 90 percent of the elementary and secondary students in the nation.

The American Association of School Administrators ("AASA"), founded in 1865, is the professional association of over 14,000 local school system leaders across America. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children. AASA supports equal educational opportunity as a key factor in providing the highest quality public education for all children.

The National Association of State Directors of Special Education ("NASDSE") is a not-for-profit

---

[1] Pursuant to Sup. Ct. R. 37.6, amici note that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Sup. Ct. R. 37.2, counsel further notes that counsel of record for the parties received timely notice of the intent to file this brief and have consented to the filing of this brief.

organization established in 1938 to promote and support education programs and related services for children and youth with disabilities. NASDSE's members include the state directors of special education in all 50 states, the District of Columbia, the Department of Defense Education Agency, the Bureau of Indian Education, federal territories and the Freely Associated States. NASDSE's primary mission is to support students with disabilities by providing services to state educational agencies to facilitate their efforts to maximize educational and functional outcomes for students with disabilities.

Amici regularly represent their members' interests before Congress and federal and state courts and have participated as *amicus curiae* in cases before this Court involving the Individuals with Disabilities Education Improvement Act, 20 U.S.C. §§ 1400 *et seq.* ("IDEA"). *See, e.g.*, *Board of Educ.* v. *Tom F. ex rel. Gilbert F.*, 128 S. Ct. 1 (2007) (per curiam); *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 126 S. Ct. 2455 (2006); *Schaffer ex rel. Schaffer* v. *Weast*, 126 S. Ct. 528 (2005).

Recognizing that all children with disabilities have a right to be provided with a free appropriate public education, NSBA, AASA and NASDSE have consistently supported the rights of disabled children. At the same time, amici are also fully cognizant of the substantial financial and human resources that public school districts devote each and every year to educating students with disabilities. These resources vastly exceed the partial funding

provided by the federal government under IDEA.[2] The burden on local school districts also is increased by an adversarial conception of IDEA, which exacts an even greater toll on limited educational resources and thus exacerbates the difficulty for school districts in deciding what educational opportunities they can afford to provide for children.

NSBA, AASA and NASDSE, therefore, assign critical importance to the issue presented in this case: whether Congress in IDEA authorized tuition reimbursement for parents who unilaterally place their children in private schools, where those children have never previously received special education services from the public schools.[3] Like the petitioner, amici contend that the Court should grant certiorari in this case to establish that the answer is no.

SUMMARY OF ARGUMENT

As this Court recognized by granting certiorari in *Tom F.*, the courts of appeals are divided over the

---

[2] While the Federal Government committed to funding 40 percent of the cost per pupil for special education when it first enacted the predecessor statute to IDEA in 1974, it currently funds less than 20 percent of those costs, creating a cumulative funding gap of more than $55 billion for the last four fiscal years. Ann Lordeman, *Individuals with Disabilities Education Act (IDEA): Current Funding Trends*, CRS Report for Congress (April 11, 2008).

[3] School districts spend more than $6.7 billion annually on assessments, evaluations, and IEP-related activities alone. *See* Jay G. Chambers, *et al.*, American Institutes for Research, *What Are We Spending on Special Education Services in the United States, 1999-2000, Rpt. 1* at 13-14 (June 2004), *available at* http://csef.air.org/publications/seep/national/AdvRpt1.pdf.

important question of whether IDEA permits parents to obtain a private school tuition reimbursement award from a public school district when they unilaterally place their child in private school without trying—or as here, without even suggesting the need for—a collaboratively-developed Individualized Education Program ("IEP") offered by the public school district. The Ninth Circuit's decision below not only deepens and clarifies that split—by specifically rejecting the First Circuit's ruling in *Greenland Sch. Dist.* v. *Amy N.*, 358 F.3d 150 (1st Cir. 2004)—it also interprets the IDEA in a way Congress never intended. The Ninth Circuit's conclusion that parents whose children never obtained special education or related services from a public agency need not comply with any of the requirements of § 1412(a)(10)(C) creates a back-door route that would advantage parents who unilaterally place a disabled child in a private school first, and then litigate against the public school district later to obtain tuition reimbursement.

The Ninth Circuit's interpretation of IDEA is contrary to the intent and carefully constructed framework of the statute. IDEA is premised on collaboration between parents and public school districts but the Ninth Circuit's decision flouts that collaborative structure by making it easier for parents to obtain private school tuition reimbursement if their child was never provided public school special education services than if the parents worked with the school district to develop a public school program appropriate for the child's needs and then allowed that program a chance to succeed. The Ninth Circuit's interpretation of IDEA also places school districts at a distinct disadvantage

in any later administrative hearing because they are forced to defend their determination of a student's ineligibility, or to make an evidentiary case in support of an IEP, based on a program that is described on paper but that the child has never had the opportunity to experience. The Ninth Circuit's interpretation of IDEA also compounds the difficulty school districts face in budgeting for special education by allowing parents to obtain tuition reimbursement awards after-the-fact for children the school district did not even know might require special education. The Ninth Circuit's decision below can only be expected to increase the already high costs of special education and the costs of litigation by encouraging parents to send their children to private school first and sue the school district for reimbursement later.

By flatly holding that § 1412(a)(10)(C)(ii) does not apply to parents who have no genuine interest in obtaining a public education for their child, the Ninth Circuit's decision allows those parents to treat the IEP process as a potential lottery ticket to a government-funded private school education. This expansion of school districts' obligations under IDEA is in contravention of the statute and should be reviewed by this Court.

ARGUMENT

I. BY EXEMPTING PARENTS OF CHILDREN WHO NEVER RECEIVE PUBLIC SPECIAL EDUCATION SERVICES FROM THE LAW'S CAREFULLY IMPOSED CONDITIONS ON TUITION REIMBURSEMENT, THE NINTH CIRCUIT DECISION CONTRAVENES THE COLLABORATIVE INTENT AND FRAMEWORK OF IDEA.

As part of its 1997 IDEA amendments, Congress sensibly adopted a threshold requirement for tuition reimbursement claims by parents who unilaterally place their children in private school: tuition reimbursement is only available for children who "previously received special education and related services under the authority" of the public school district. 20 U.S.C. § 1412(a)(10)(C)(ii). The plain language of this provision makes clear that where a child has not previously received special education from a school district, neither a court nor a hearing officer has authority to reimburse tuition expenses arising from a parent's unilateral placement of the child in private school. The amendment simply requires that parents of children with disabilities give public schools a realistic chance to serve their children before unilaterally rejecting what the public school offers—and forcing the school district to fund a private school education.

In addition to the threshold requirement, Congress determined that students who have previously received public special education services may be denied tuition reimbursement, in whole or in part, if the parents (1) failed to inform the student's IEP

team that they were rejecting the proposed placement, (2) did not give written notice to the public agency ten days prior to removing the student from public school, (3) did not make the student available for an evaluation, or (4) otherwise acted unreasonably. 20 U.S.C. § 1412(a)(10)(C)(iii). In *T.A.*, the Ninth Circuit concluded not only that IDEA allows parents to receive tuition reimbursement for a disabled child who never received special education services from a public agency, but also that those parents are not subject to these statutory requirements.

The perverse outcome of this conclusion starkly demonstrates that the Ninth Circuit's interpretation of the law is flawed and inconsistent with the purposes and structure of IDEA. Under the Ninth Circuit's reading of the IDEA, parents who act consistently with IDEA's purpose and structure and in good faith place their disabled children in public school and give the school a chance to provide a free appropriate public education are subject to more procedural hurdles when they determine that the public school is unable to serve their children than are parents who disregard IDEA's purpose and structure and never give the school district a chance. By interpreting the law to favor parents of disabled students who never received special education services from a public school, the Ninth Circuit ignores IDEA's fundamental goal of promoting public education for disabled students, seriously undermines IDEA's collaborative framework and disturbs the balance the Act seeks to strike between the interests of public schools and the interests of disabled students.

A. IDEA's History and Fundamental Requirements Show that Appropriate *Public* School Placements are Preferred.

The principal motivating force behind IDEA and its predecessor was to stop the exclusion of disabled students from *public* schools—not to increase the opportunity for disabled children to attend private schools at public expense. In the 1970s "the majority of disabled children in America 'were either totally excluded from schools or sitting idly in regular classrooms awaiting the time when they were old enough to drop out.' " *Schaffer ex rel. Schaffer* v. *Weast*, 126 S. Ct. 528, 531 (2005) (quoting H.R. Rep. No. 94-332, at 2 (1975)). Congress' findings from the 2004 IDEA reauthorization re-emphasize this fact. Before the enactment of IDEA and its precursor, "the educational needs of millions of children with disabilities were not being fully met because * * * the children were excluded entirely from the public school system and from being educated with their peers." 20 U.S.C. § 1400(c)(2).

The purpose of IDEA was "to reverse this history of neglect" and bring students with disabilities into the main-stream of the public school community. *Schaffer*, 126 S. Ct. at 531. This purpose is readily apparent: "the face of the statute evinces a congressional intent to bring previously excluded handicapped children into the *public education systems* of the States." *Board of Educ. v. Rowley*, 458 U.S. 176, 189 (1982) (emphasis added).

The Act's "least restrictive environment" ("LRE") mandate, also known as its "mainstreaming"

requirement, further underscores IDEA's goal of promoting public school access for children with disabilities. 20 U.S.C. § 1412(a)(5). Through this requirement, the Act incorporates a strong preference that, whenever possible, children with disabilities attend schools and classes with children who are not disabled—giving rise to a presumption in favor of a child's placement in the public schools. *See, e.g., Independent Sch. Dist. No. 283* v. *S.D.*, 88 F.3d 556, 561 (8th Cir. 1996) (hearing officer erred by ignoring IDEA's "strong preference" in favor of public school placement).

Given this presumption, a school district may only resort to use of a private school to educate a child with a disability when "public educational services appropriate for the handicapped child are not available." *Hessler ex rel. Britt* v. *State Bd. of Educ.*, 700 F.2d 134, 138 (4th Cir. 1983). The public school has a duty to provide services to the student and to include the student in the public school community to the maximum extent practicable.

The Ninth Circuit's decision, which advantages parents who never work with the public school district to attempt to include their disabled child in a public school program tailored to their child's needs, is contrary to the well-established preference in the IDEA for public schooling of disabled children wherever possible. Indeed, it eviscerates the LRE mandate by allowing parents to obtain public funding for a private school placement without ever trying the public school program.

B. IDEA Establishes a Collaborative Framework for Parents and Public Schools to Work in Tandem to Ensure Appropriate Educational Programs for Children with Disabilities.

The "core of [IDEA] * * * is the cooperative process that it establishes between parents and schools." *Schaffer*, 126 S. Ct. at 532. *See also Rowley*, 458 U.S. at 205-206 (Congress gave "parents and guardians a large measure of participation at every stage of the administrative process"). The collaborative decision-making process at the heart of IDEA is undermined when parents do not cooperate in good faith with school districts. Congress' decision to require parents at least to attempt to ensure an appropriate public school placement before they are eligible for private school tuition reimbursement fosters just such good-faith collaboration. The Ninth Circuit decision below, however, will encourage parents not to collaborate with public school districts because to do so will disadvantage them if they later seek private-school tuition reimbursement.

As the Court recently stated in *Schaffer*, the "central vehicle for this collaboration is the IEP process," and parents and guardians "play a significant role" in the process. 126 S. Ct. at 532. From its very outset, for each individual child, the content of an appropriate education is defined collectively in an IEP by a team that includes (among others) the parents and teachers of the student. *See* 20 U.S.C. § 1414(d); *Honig* v. *Doe*, 484 U.S. 305, 311 (1988).

Parents are also involved in an ongoing process of evaluating the implementation of the child's educational program and revising IEPs. At least annually the whole IEP team, including the parents, formally reviews whether the plan's goals are being achieved and revises the IEP as needed. The team also considers the results of reevaluations of the child and other new information about the child and his or her needs, including any such information submitted by the parents. 20 U.S.C. § 1414(d)(3-4).

When a child has never received special education services from the public school system, requiring parents to request an evaluation—before placing their child in private school—to determine whether their child is disabled and eligible for services under the IDEA is entirely consistent with the collaborative model established in the IDEA. Likewise, requiring parents at least to try the services recommended by an IEP team before rejecting them in favor of a private placement furthers this collaborative model. Moreover, requiring parents to work in good faith with school staff recognizes that providing a free appropriate public education to any given child may require an ongoing process of adaptation. By contrast, to allow parents to obtain tuition reimbursement when they initially agreed that their child was ineligible for special education, only to later request an evaluation and a due process hearing after removing the child from public school, would belittle both the cooperative approach of IDEA and the complexity of educating disabled students.

IDEA's emphasis on prompt cooperative solutions imposes obligations on school districts and parents alike to ensure their good faith commitment to a

truly collaborative process. The 1997 IDEA amendments, for example, included a number of provisions that made some of the procedural duties of parents quite explicit. Requiring cooperation in these smaller ways would make little sense if the Act entitles parents who abandon public schools before even challenging whether their child was eligible for services, or who reject a proposed placement without trying the services offered by the public school district, to receive tuition reimbursement.

The 1997 amendments, for example, added a provision indicating that reimbursement may be denied or reduced if the parents do not give the school district notice of their intent to remove a child from public school before they do so. 20 U.S.C. § 1412(a)(10)(C)(iii)(I). Therefore, before removing a child from a public school, parents must inform the IEP team that they are rejecting the proposed placement, state their concerns with the proposal, and indicate their intent to enroll their child in a private school at public expense. 34 C.F.R. § 300.148(d). In addition, parents must give the school district written notice of these factors at least ten days prior to removing their child from a public school. *Id.* The reason for this is clear: Without a good faith commitment to the process by all parties, true collaboration in determining the development and implementation of a free appropriate public education would not be possible. *See, e.g.*, *M.S. ex rel. M.S.* v. *Mullica Twp. Bd. of Educ.*, No. 06-533, 2007 WL 1096804 (D.N.J. Apr. 12, 2007), *aff'd*, 263 F. App'x. 264 (3d Cir. 2008) (parents' refusal to cooperate prevented creation of appropriate IEP). If rejecting a placement requires timely notice and a list of reasons to ensure a collaborative process, then

not even attempting to secure services under IDEA before removing the child from public school is the antithesis of this collaborative process.

School districts, too, share an obligation under the Act to attempt in good faith to identify and evaluate children in need of special education and to negotiate workable IEPs—and to agree to private placements when they cannot. School districts frequently agree to private placements where they are unable to provide an appropriate educational program themselves. In 2005, for example, there were 88,098 students with disabilities educated in private schools at public expense. *See* U.S. Department of Education, IDEA data, Table 2-5: Number of students ages 6 through 21 served under IDEA, Part B, in the U.S. and outlying areas, by disability category and educational environment, Fall 1996 through Fall 2005, *available at* https://www.ideadata.org/ tables29th/ar_2-5.htm [hereinafter IDEA data]. The overwhelming majority of these placements were ones that school districts agreed were appropriate to ensure the child in question received the education mandated by IDEA. School districts thus voluntarily expend hundreds of millions of dollars in state and local revenue on agreed private placements—which occur when the collaborative process established by the Act is operating as it is intended.

C. IDEA Provides Numerous Procedural Protections to Parents, Students and School Districts in an Effort to Balance the Costs and Benefits of IDEA.

The fundamental goal of IDEA is a "free appropriate public education" in the "least restrictive environment" for all students with disabilities. 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(5). IDEA establishes procedural rights and obligations for parents and school districts alike to achieve that goal in a manner that ensures education opportunities for disabled children while recognizing the financial costs entailed. To require school districts to reimburse the cost of private school tuition without first affording the district the opportunity to provide a free appropriate public education ignores the equally important interests of school districts and parents that IDEA seeks to balance through carefully constructed procedural rights and obligations.

The Act imposes numerous procedural obligations on public school districts to ensure prompt resolution of disputes, in the event that the collaborative approach is unsuccessful. Under IDEA, school districts must respond to parents' complaints within a short timeframe. Indeed, since the adoption of Section 1412(a)(10)(C)(ii), Congress has tightened the deadlines for school districts. For example, when a school district receives notice of a due process complaint, it has only 10 days to explain to the parents why it has proposed or refused to take the action at issue. 20 U.S.C. § 1415(c)(2)(B)(i)(I). Within 15 days, the school district must convene a meeting with the parents and relevant IEP team

members, at which the parents and child are given an opportunity to discuss their complaint and try to resolve the dispute amicably. *Id.* § 1415(f)(1)(B). If the complaint is not fully resolved within 30 days, a due process hearing must be scheduled. *Id.* The Act also provides parents and guardians with a right to publicly funded, confidential mediation. *Id.* § 1415(e).

The 1997 IDEA amendments include several provisions that make certain procedural duties of parents quite explicit. For example, the 1997 amendments specify that private school tuition reimbursement may be denied or reduced if the parents do not give the school district notice of their intent to remove a child from public school before they do so. *See* 20 U.S.C. § 1412(a)(10)(C)(iii)(I); 34 C.F.R. § 300.148(d). These procedural safeguards emphasize that school districts should be given an opportunity to provide a free appropriate public education before parents are able to obtain tuition reimbursement for a unilateral private school placement.

The Ninth Circuit's interpretation flouts those safeguards and the balance IDEA seeks to achieve. According to that court, because parents are not statutorily barred from receiving tuition reimbursement where their disabled children never received public special education services, they are not subject to statutory requirements imposed on parents who seek tuition reimbursement for private placement of disabled children who did previously receive special education. The Ninth Circuit's decision can only encourage parents not to work within the framework of IDEA to develop a plan for a

free appropriate public education for their disabled children. Such a message is completely antithetical to Congress' intent.

II. THE NINTH CIRCUIT'S RULING PROVIDES UNFAIR LITIGATION ADVANTAGES TO PARENTS WHO NEVER WORK WITH THE SCHOOL DISTRICT AND CREATES BUDGETING UNCERTAINTY FOR SCHOOL DISTRICTS.

A. School Districts Are Substantially Limited in their Ability to Demonstrate That They Provided FAPE If They Never Have the Opportunity to Provide Special Education Services to a Student.

The advantage provided by the Ninth Circuit's interpretation of IDEA to parents who fail to work within the collaborative structure of the statute goes beyond the fact that those parents need not comply with the statutory requirements imposed by IDEA on those parents whose children have received public special education services. As a practical matter, parents whose children have not received public special education services will also benefit from an advantage in any later administrative proceeding or litigation with the school district.

Under the Ninth Circuit's ruling, because parents do not have to give notice that they intend to place their child in a private school, the school district will sometimes not even have the opportunity to evaluate the child, much less develop an IEP, until after the child is in a private school. The ensuing evaluation and any development of an IEP inevitably will occur

under an adversarial shadow, with the parents' rejection of any determination of ineligibility or offer of an IEP public placement already set and the occurrence of a due process hearing a foregone conclusion. Under such circumstances, a school district knows that any determination the child is ineligible will place it in an extremely weak position should the due process hearing officer disagree. It will not only be found to have denied FAPE by its ineligibility finding but also will not have developed an IEP which can be examined to determine the appropriateness of the placement and services offered.

Where the school district has already determined prior to the parents' unilateral removal that a child is eligible for special education, unilateral refusal by parents to try an IEP means that school officials are never given the opportunity to make (or refuse to make) changes depending on how a child responds to the IEP developed. While there is no guarantee that a proposed IEP will always accommodate every child, the school district should have the opportunity to try less restrictive alternatives than private placements. *See, e.g., T.F.* v. *Special Sch. Dist. of St. Louis County*, 449 F.3d 816, 821 (8th Cir. 2006) ("district should have had the opportunity, and to an extent had the duty, to try these less restrictive alternatives before recommending a residential placement"). And if a problem with the IEP becomes apparent, school districts need to be able to investigate and respond to the problem—before being saddled with tens of thousands of dollars in tuition reimbursement. *See M.C. on behalf of J.C.* v. *Central Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996) (district "may not be able to act immediately to correct an inappropriate

IEP; it may require some time to respond to a complex problem").

When parents unilaterally place their child in a private school without determining whether their child is even eligible for an IEP, or before implementation of a collaboratively developed IEP, school districts are thus denied the ability to litigate the case on an even footing with the parents. For example, where eligibility is contested, the due process hearing officer will be weighing the district's determination of ineligibility, (*i.e.*, its intent to offer no services), against the parents' claim that their child is in need of services as reinforced by evidence of how well the child is doing while receiving the panoply of services available at the private placement. Where eligibility is not at issue, the hearing officer is forced to evaluate in a vacuum whether the IEP would have been appropriate, because the child has no experience with the public school placement. This necessitates an abstract inquiry. Although an IEP is supposed to be judged prospectively as of the time it was developed, in many cases, the parents point precisely to how the child is doing in the private placement as some sort of "proof" of their speculation that the public placement was not sufficient. *See, e.g., Justin G. ex rel. Gene R.* v. *Board of Educ. of Mont. Co.*, 148 F. Supp. 2d 576 (D. Md. 2001). In addition to encouraging improper "Monday morning quarterbacking" of the IEP developed by the public school, the parent's "proof" of private school success is meaningless in the absence of having tried the public placement.

The Ninth Circuit's interpretation of IDEA thus allows, and even encourages, parents and their attorneys to sit back and never even try to obtain an IEP in hopes that the school district members of an IEP team will, in the opinion of a hearing officer, incorrectly conclude their child is not disabled or the IEP is not effective. At a minimum, parents and their attorneys will be more able to convince a hearing officer or administrative law judge that the school district did so, a process made easier by asking the hearing officer to compare the school district's proposed program, or lack thereof, to the private school's actual program. In contrast, for a student who has attended the public schools, has gone through the evaluation process, and has tried the IEP proposed by the school district, the school district will be able to provide evidence at an administrative hearing of its actual efforts with the student, rather than just a written evaluation or IEP on a piece of paper. It cannot be that in amending IDEA to include § 1412(a)(10)(C), Congress intended to provide such an advantage to families who never try to work with the public school system in obtaining public special education services for their children through the IDEA.

B. School Districts Are Unable to Accurately Budget for Special Education Services When They May Be Required to Pay for Unilateral Private Placements for Students who Never Received Special Education Services.

The Ninth Circuit's interpretation of IDEA also places public school districts at a distinct disadvantage in terms of determining their budgets

for special education services. Budgeting for special education services is already a difficult process for public school districts. These costs have been described as the "wild cards in school district budgets," because they are based on particular needs of specific students and can change from year to year. Melanie Asmar, *Special Education Costs Soar; Unpredictable Bill Can Strain Local Districts,* Concord Monitor, Feb. 17, 2008. In addition, the costs of private placements for special education students can be particularly expensive. While the residential program for which respondent sought reimbursement here cost more than $5,000 per month—or approximately $45,000 per year—costs for some private placements can be "as much as $100,000 per year." *Id.* As one superintendent explained, "You really can have just a few very high-cost students come into your district and have a huge impact on your cost per pupil." Meaghan M. McDermott, *Special Ed*, Rochester Democrat and Chronicle, Dec. 2, 2007, at 1A.

The Ninth Circuit's ruling below that § 1412(a)(10)(C) does not apply to a student who never received special education services from a public school district makes an already difficult budgeting process for public school districts even more unpredictable. School districts are simply unable to estimate possible costs associated with private placements where they have no means of determining the number of students who might be eligible for private school reimbursement, and where decisions as to whether or not reimbursement is appropriate are based on indeterminate notions of equity rather than statutory rules and procedures. Rather than having advance notice and an

opportunity to plan ahead in budgeting for a student whom the public school district has attempted to serve, the Ninth Circuit rule means that school districts will be hit after-the-fact with potentially large tuition reimbursement claims for private placements of students who the school district did not even know might require such services.

The budgeting challenges in this case exemplify the problem. How could the school district have suspected in 2001, after T.A.'s mother *agreed* with the district that he was ineligible for special education services, that a few years later he would be in a residential placement costing $45,000 a year for ADHD?

III. PERMITTING REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENTS MADE BEFORE THE CHILD EVER RECEIVES SPECIAL EDUCATION SERVICES FROM A PUBLIC SCHOOL WOULD INCREASE LITIGATION COSTS AND DIVERT RESOURCES FROM EDUCATION.

A. Litigation Costs Under IDEA Are High.

Litigation costs under IDEA are often prohibitive for school districts. In 1999-2000, the average cost of a litigated case was $94,600 for the year. Jay G. Chambers, *et al.*, American Institutes for Research, *What Are We Spending on Procedural Safeguards in Special Education, 1999-2000*, *Rpt. 4* at 8 (May 2003), *available at http://csef.air.org/publications/SEEP/national/Procedural%20Safeguards.pdf* [hereinafter Chambers, Procedural Safeguards]. Congress is aware of this problem and has been

trying to rein in these costs. As a Senate Report from the 1997 amendments makes clear, "[t]he growing body of litigation surrounding IDEA is one of the unintended and costly consequences of this law." S. Rep. No. 104-275, at 85 (1996).

But school districts are pushed to litigate as more and more parents seek reimbursement for expensive private school placements for their children. The costs of reimbursing parents for private school placements, such as respondents seek here, average more than $26,000 per student–more than four times the cost of public placements. U.S. Dep't of Educ., *Twenty-fourth Annual Report to Congress on the Implementation of IDEA*, I-30 to I-31 (2002). And in roughly the last decade, the number of private placements has increased at more than *twice* the pace that the number of special education students has increased. According to the United States Department of Education, 88,098 students with disabilities were educated in private schools at public expense in 2005. From 1996-2005, while the number of children ages 6-21 who receive special education and related services for all disabilities rose by 17% across the Nation, the number of children in publicly funded private placements rose by over 34%. *See* IDEA data, *supra*, at Table 2-5.

Even if parents and the school district can resolve the conflict prior to litigation, due process hearings and mediations themselves add significant costs to the special education budget. In 1998-1999, more than 6,750 due process hearings and 4,250 mediations were held. *See* Chambers, Procedural Safeguards, *supra*, at 8. And on average, schools spent $8,160-$12,200 for *each* due process hearing or

mediation. *Id.* Given that the average per pupil expenditure for special education services is about $8,000, a due process hearing or mediation effectively doubles a school district's cost to educate a single disabled child. *See id.* at 3; U.S. Dep't of Educ., *Twenty-fourth Annual Report to Congress on the Implementation of the IDEA*, I-22, I-26 (2002).

School districts do not engage in these expensive disputes to avoid providing appropriate education to special needs students; indeed, more than 55% of resolved due process hearings and litigation cases are decided entirely in favor of the school district, while 65% of due process hearings and 83% of litigation cases result in at least a partial victory for the district. *See* Chambers, Procedural Safeguards, *supra*, at 20. Every dollar a school district spends on private placements and litigation to avoid unnecessary private placements is a dollar less for providing special education and related services to students in the public schools.

B. The Ninth Circuit's Decision Will Encourage Litigation.

The 2004 amendments contain several provisions designed to "[r]estor[e] trust and reduc[e] litigation" under IDEA and to alleviate the "excessive litigation under the Act." H.R. Rep. No. 108-77, at 85, 116 (2003). *See, e.g.*, 20 U.S.C. § 1415(b)(7)(A) (notice requirements for complaints); 20 U.S.C. § 1415(b)(6)(B) (statute of limitations); 20 U.S.C. § 1415(e) (mediation and nonbinding arbitration); 20 U.S.C. § 1415(i)(3)(B) (attorney's fees for frivolous claims); H.R. Rep. No. 108-77, at 85-86 (discussing new provisions). But ruling that *Burlington Sch.*

Comm. v. *Department of Educ.*, 471 U.S. 359 (1985), and *Florence County Sch. Dist. Four* v. *Carter*, 510 U.S. 7 (1993), are not limited by Section 1412(a)(10)(C)(ii) would only result in a continued flood of private school parents seeking to play in a tuition-reimbursement lottery, regardless of their interest (or lack thereof) in securing a public education for their children. It would place school districts nationwide, many of them small and financially strapped, in the untenable position of being forced to choose between an expensive private school placement on the one hand and costly litigation on the other.

The reality is that the Court's holdings in *Burlington* and *Carter* exploded the number of tuition reimbursement cases that school districts must litigate, mediate, or settle. And if parents are free to unilaterally place their children in private schools and then seek reimbursement, without ever trying the public school's program (or in this case, even working with the school to create an individualized program), that number will expand exponentially. IDEA is intended to ensure a free and appropriate *public* education for students with disabilities—resort to a private placement is permissible only in extraordinary circumstances. Allowing private tuition reimbursement in cases where the child has not previously received special education services in the public schools would work against the intent of the Act, forcing school districts into a no-win choice between expensive litigation and expensive private placements and offering windfalls to parents who prefer private schools.

CONCLUSION

For the foregoing reasons, as well as those contained in the petition, amici respectfully request that this Court grant certiorari, and reverse the decision of the Ninth Circuit.

Respectfully submitted,

Of Counsel:

FRANCISCO M. NEGRÓN, JR.
GENERAL COUNSEL
NAOMI GITTINS
NATIONAL SCHOOL BOARDS ASSOCIATION
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

MAREE F. SNEED*
JOHN W. BORKOWSKI
AUDREY J. ANDERSON
STEPHANIE J. GOLD
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

* Counsel of Record

Counsel for Amici Curiae

JOINT APPENDIX

121

(5)

No. 08-305

Supreme Court, U.S.
FILED
FEB 25 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,
Petitioner,

v.

T.A.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

GARY FEINERMAN*
SIDLEY AUSTIN LLP
One South Dearborn St.
Chicago, IL 60603
(312) 853-7000

DAVID B. SALMONS*
BINGHAM MCCUTCHEN LLP
2020 K Street, NW
Washington, DC 20006
(202) 373-6283

RICHARD COHN-LEE
ANDREA L. HUNGERFORD
THE HUNGERFORD LAW FIRM, LLP
P.O. Box 3010
Oregon City, OR 97045
(503) 650-7990

MARY E. BROADHURST
MARY E. BROADHURST, P.C.
P.O. Box 11377
Eugene, OR 97440
(541) 683-8530

Counsel for Petitioner

Counsel for Respondent

*Counsel of Record
[Additional Counsel Listed on Inside Cover]

February 25, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002
PETITION FOR CERTIORARI FILED SEPTEMBER 3, 2008
CERTIORARI GRANTED JANUARY 16, 2009

EAMON P. JOYCE
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, N.Y. 10019
(212) 839-5300

RYAN C. MORRIS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

TABLE OF CONTENTS

	Page
United States District Court, District of Oregon, Docket Entries	1
United States Court of Appeals, Ninth Circuit, Docket Entries	17
Referral for Special Education, Ex. B1, Plaintiff-Appellee's Supplemental Excerpts of Record, *Forest Grove Sch. Dist.* v. *T.A.*, No. 05-35641 (9th Cir. Dec. 7, 2005)	27
Wechsler Individual Achievement Test Record Form Summary, Ex. B1, Plaintiff-Appellee's Supplemental Excerpts of Record, *Forest Grove Sch. Dist.* v. *T.A.*, No. 05-35641 (9th Cir. Dec. 7, 2005)	28
Statement of Eligibility for Special Education, Ex. B1, Plaintiff-Appellee's Supplemental Excerpts of Record, *Forest Grove Sch. Dist.* v. *T.A.*, No. 05-35641 (9th Cir. Dec. 7, 2005)	29
Psychological Assessment Report, Ex. B5, Plaintiff-Appellee's Supplemental Excerpts of Record, *Forest Grove Sch. Dist.* v. *T.A.*, No. 05-35641 (9th Cir. Dec. 7, 2005)	31
Psycho-Social Assessment, Ex. B8, Plaintiff-Appellee's Supplemental Excerpts of Record, *Forest Grove Sch. Dist.* v. *T.A.*, No. 05-35641 (9th Cir. Dec. 7, 2005)	60

Parents Rights for Special Education, Ex. B16a, Appellant's Supplemental Excerpts of Record, *Forest Grove Sch. Dist.* v. *T.A.*, No. 05-35641 (9th Cir. Jan. 4, 2006) 70

Multidisciplinary Team Meeting Notes, Ex. A12, Appellant's Supplemental Excerpts of Record, *Forest Grove Sch. Dist.* v. *T.A.*, No. 05-35641 (9th Cir. Jan. 4, 2006) 96

Evaluation Report from 2001, Ex. A2, Appellant's Supplemental Excerpts of Record, *Forest Grove Sch. Dist.* v. *T.A.*, No. 05-35641 (9th Cir. Jan. 4, 2006) 98

Ex. B3a, Administrative Due Process Hearing, *Education of T.A.* v. *Forest Grove Sch. Dist.*, OAH Case No. 20031306 (Or. Superintendent of Pub. Educ. Sept. 25-Oct. 22, 2002) 103

NOTICE

The following documents have been omitted from the printing of this Joint Appendix. They may be found in the Petitioner's Appendix to the 08-305 Petition For A Writ Of Certiorari at the following pages:

Forest Grove Sch. Dist. v. *T.A.*, 523 F.3d 1078 (9th Cir. 2008) 1a

Forest Grove Sch. Dist. v. *T.A.*, No. CV 04-331-MO (D. Or. May 11, 2005)..... 25a

Education of T.A. v. *Forest Grove Sch. Dist.*, OAH Case No. 20031306 (Or. Superintendent of Pub. Educ. Jan. 26, 2004) 56a

Forest Grove Sch. Dist. v. *T.A.*, No. 05-35641 (9th Cir. June 5, 2008) (order denying reh'g and reh'g en banc) 160a

U.S. DISTRICT COURT
DISTRICT OF OREGON (PORTLAND)

FOREST GROVE SCHOOL DISTRICT
Plaintiff,

v.

T.A.
Defendant.

DOCKET ENTRIES

Date Filed	#	Docket Text
03/08/2004	1	Complaint. Filing Fee in amount of $150.00 collected. Receipt No. 173198 issued. Filed by Forest Grove School District against T.A.. (pvh) (Entered: 03/09/2004)
03/08/2004	2	Discovery and Pretrial Scheduling Order and Notice of Case Assignment to the Honorable Michael W Mosman. Discovery to be completed by 7/6/2004. Joint Alternate Dispute Resolution Report due by 8/5/2004. Joint Status Report due by 7/6/2004. Pretrial Order due by 8/5/2004. Signed on 03/08/04 by Judge Michael W Mosman. (pvh) (Entered: 03/09/2004)
03/19/2004	3	Amended Complaint. (Appeal of Hearing Officer's Decision Pursuant To Individuals with Disabilities Education Act ("IDEA")) Filed by

Date Filed	#	Docket Text
		Forest Grove School District against T.A.. (cib) (Entered: 03/23/2004)
05/10/2004	4	Defendant's Answer. Filed by T.A.. (cib) (Entered: 05/12/2004)
06/10/2004	5	**CIVIL MINUTES: Record of Order** by Michael W. Mosman. Rule 16 Conference set for 6/15/2004 at 11:00AM in Telephone before Judge Michael W. Mosman. The court will initiate the call. Ordered by Judge Michael W. Mosman. (dls) (Entered: 06/10/2004)
06/15/2004	6	**CIVIL MINUTES: Record of Proceedings:** Status Conference. Dispositive Motions due by 7/14/2004. Response to Dispositive Motions due by 7/30/2004. Replies to Dispositive Motions due by 8/13/2004. Joint Alternate Dispute Resolution Report extended from 8/5/2004, due by 11/1/2004. Pretrial Order extended from 8/5/2004, due by 11/1/2004. Richard G Cohn-Lee present as counsel for plaintiff(s). Mary E Broadhurst present as counsel for defendant(s). Court Reporter or Tape No.: Julie Colling. Michael W. Mosman presiding. (dls) (Entered: 06/15/2004)
07/12/2004	7	Unopposed Motion for Extension of Time For Opening Brief. Filed by Forest Grove School District. (cib) (Entered: 07/14/2004)

Date Filed	#	Docket Text
07/12/2004	8	Declaration of Richard G. Cohn-Lee In Support. Filed by Forest Grove School District. (Related document(s): Motion for Extension of Time 7.)(cib) (Entered: 07/14/2004)
07/15/2004	9	**ORDER:** Record of Order by Judge Michael W. Mosman. GRANTING Motion for Extension of Time 7. Plaintiff's Brief due 7/28/04. Response to Brief due by 8/11/2004. Reply Brief due 8/25/04. (dls) (Entered: 07/15/2004)
07/28/2004	10	Motion for Leave to File Enlarged Opening Brief in Support of its Appeal. Filed by Forest Grove School District. (dmd) (Entered: 07/29/2004)
07/28/2004	11	Opening Brief in Support of its Appeal. Filed by Forest Grove School District. (dmd) (Entered: 07/29/2004)
08/09/2004	12	**ORDER:** Record of Order by Judge Michael W. Mosman. GRANTING Motion for leave to File Enlarged Opening Brief in Support of its Appeal 10. THE PARTIES ARE DIRECTED TO USE THE CORRECT CASE NUMBER AND JUDGE'S INITIALS CV04-331-MO, ON ALL FUTURE PLEADINGS. (dls) (Entered: 08/09/2004)

Date Filed	#	Docket Text
08/09/2004	13	Amended Opening Brief In Support Of Its Appeal. Filed by Forest Grove School District. (cib) (Entered: 08/11/2004)
08/11/2004	14	Defendant T.A.'s Response. Filed by T.A.. (cib) (Entered: 08/17/2004)
08/25/2004	15	Unopposed Motion To Extend Deadline For Reply Brief. Filed by Forest Grove School District. (cib) (Entered: 08/26/2004)
08/25/2004	16	Declaration of Richard G. Cohn-Lee In Support of Motion. Filed by Forest Grove School District. (Related document(s): Motion for Extension of Time 15.)(cib) (Entered: 08/26/2004)
08/30/2004	17	**ORDER:** Record of Order by Judge Michael W. Mosman. GRANTING Motion for Extension of Time 15. Reply due by 8/30/2004. (dls) (Entered: 08/30/2004)
08/30/2004	18	Reply Brief In Support Of Its Appeal. Filed by Forest Grove School District. (cib) (Entered: 08/31/2004)
08/30/2004	19	Declaration of Richard G. Cohn-Lee In Support. Filed by Forest Grove School District. (Related document(s): Reply Brief In Support Of Its Appeal 18.) (cib) (Entered: 08/31/2004)
09/09/2004	20	Motion to Strike Reply 18. Filed by T.A.. (cib) (Entered: 09/13/2004)

Date Filed	#	Docket Text
09/23/2004	21	Response to Rule 11 Motion for Sanctions and Motion to Strike Reply 18 20. Filed by Forest Grove School District. (dls) (Entered: 09/24/2004)
10/05/2004	22	Rule 11 Motion for Sanctions. Filed by Defendant T.A. (peg) (Entered: 10/07/2004)
10/05/2004	24	Reply To Plaintiff's Response to Defendant's Rule 11 Motion for Sanctions 22. Filed by T.A.. (cib) (Entered: 10/14/2004)
10/07/2004	23	Reply to Plaintiff's Response To Defendant's Motion to Strike 18 20. Filed by T.A.. (cib) (Entered: 10/14/2004)
03/17/2005	25	**ORDER:** Record of Order by Judge Michael W. Mosman. Defendant T.A.'s Motion to Strike Appendix A the Declaration of Richard G Cohen-Lee in support of the Reply is GRANTED 20. Defendant T.A.'s Motion for Sanctions 22 is DENIED as is any counter motion for sanctions by plaintiff. (dls) (Entered: 03/17/2005)
05/11/2005	26	Opinion and Order. IT IS HEREBY ORDERED that the conclusion of the hearing officer that the District is liable for the costs incurred in sending T.A. to Mt. Bachelor Academy is REVERSED. The court will

Date Filed	#	Docket Text
		enter judgment in favor of the District and against T.A. Signed on 5/11/05 by Judge Michael W. Mosman. (dls) (Entered: 05/11/2005)
05/11/2005	27	Judgment. IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of plaintiff appellant and against defendant-appellee. Signed on 5/11/05 by Judge Michael W. Mosman. (dls) (Entered: 05/11/2005)
06/08/2005	28	Notice of Appeal (with attached Representation Statement) to USCA 9th Circuit from Order 26 and from Judgment 27 entered 5/11/05. Filing fee in amount of $255.00 collected; Receipt No. 600000527 issued. Filed by T.A.. (Related Document(s): Order, Judgment 27) (tomg) (Entered: 06/16/2005)
06/16/2005		Notification of Appeal 28 sent to USCA for the 9th Circuit and to counsel along with a copy of the docket sheet. CADS mailed to Court of Appeals. (Related Document(s): Notice of Appeal, 28) (tomg) (Entered: 06/16/2005)
07/01/2005	29	Notification by USCA 9th Circuit of case number CA 05-35641 for Notice of Appeal 28 filed by T.A. on 6/8/05, including Briefing Schedule. (Related Document(s): Notice of Appeal, 28) (tomg) (Entered: 07/07/2005)

Date Filed	#	Docket Text
09/06/2005	30	Certificate of Record transmitted to USCA for the 9th Circuit re Notice of Appeal CA 05-35641 28 filed by T.A. on 6/8/05. (Related Document(s): Notice of Appeal, 28) (tomg) (Entered: 09/07/2005)
10/27/2005	31	Order for Administrative Correction of the Record. A Clerical error has been discovered in the case record. In accordance with Fed. R. Civ. P. 60(a), the Clerk is directed to make the following administrative corrections to the record and to notify all parties accordingly. The court was sent the Transmittal of Stipulated Record on August 9, 2004. These documents were sent directly to chambers without first being entered on the docket sheet. The court has located these documents and will enter them on the docket sheet. TRANSMITTAL OF STIPULATED RECORD. (dls) Additional attachment(s) added on 10/28/2005 (dls). (Entered: 10/28/2005)
10/27/2005	32	Order for Administrative Correction of the Record. A Clerical error has been discovered in the case record. In accordance with Fed. R. Civ. P. 60(a), the Clerk is directed to make the following administrative corrections to the record and to notify all parties accordingly. The court was sent the Transmittal of Stipulated

Date Filed	#	Docket Text
		Record on August 9, 2004. These documents were sent directly to chambers without first being entered on the docket sheet. The court has located these documents and will enter them on the docket sheet. TRANSMITTAL OF ENTIRE RECORD AND TRANSCRIPT. (dls) (Entered: 10/28/2005)
10/27/2005	33	Order for Administrative Correction of the Record. A Clerical error has been discovered in the case record. In accordance with Fed. R. Civ. P. 60(a), the Clerk is directed to make the following administrative corrections to the record and to notify all parties accordingly. The court was sent the Transmittal of Stipulated Record on August 9, 2004. These documents were sent directly to chambers without first being entered on the docket sheet. The court has located these documents and will enter them on the docket sheet. PREHEARING TRANSCRIPT. (dls) (Entered: 10/28/2005)
10/27/2005	34	Order for Administrative Correction of the Record. A Clerical error has been discovered in the case record. In accordance with Fed. R. Civ. P. 60(a), the Clerk is directed to make the following administrative corrections to the record and to notify all parties accordingly. The court was

Date Filed	#	Docket Text
		sent the Transmittal of Stipulated Record on August 9, 2004. These documents were sent directly to chambers without first being entered on the docket sheet. The court has located these documents and will enter them on the docket sheet. TRANSCRIPT VOLUME 1. (dls) (Entered: 10/28/2005)
10/27/2005	35	Order for Administrative Correction of the Record. A Clerical error has been discovered in the case record. In accordance with Fed. R. Civ. P. 60(a), the Clerk is directed to make the following administrative corrections to the record and to notify all parties accordingly. TRANSCRIPT VOLUME II. (dls) (Entered: 10/28/2005)
10/27/2005	36	Order for Administrative Correction of the Record. A Clerical error has been discovered in the case record. In accordance with Fed. R. Civ. P. 60(a), the Clerk is directed to make the following administrative corrections to the record and to notify all parties accordingly. The court was sent the Transmittal of Stipulated Record on August 9, 2004. These documents were sent directly to chambers without first being entered on the docket sheet. The court has located these documents and will enter them on the docket sheet.

Date Filed	#	Docket Text
		TRANSCRIPT VOLUME III. (dls) (Entered: 10/28/2005)
10/27/2005	37	Order for Administrative Correction of the Record. A Clerical error has been discovered in the case record. In accordance with Fed. R. Civ. P. 60(a), the Clerk is directed to make the following administrative corrections to the record and to notify all parties accordingly. The court was sent the Transmittal of Stipulated Record on August 9, 2004. These documents were sent directly to chambers without first being entered on the docket sheet. The court has located these documents and will enter them on the docket sheet. TRANSCRIPT VOLUME IV. (dls) (Entered: 10/28/2005)
10/27/2005	38	Order for Administrative Correction of the Record. A Clerical error has been discovered in the case record. In accordance with Fed. R. Civ. P. 60(a), the Clerk is directed to make the following administrative corrections to the record and to notify all parties accordingly. The court was sent the Transmittal of Stipulated Record on August 9, 2004. These documents were sent directly to chambers without first being entered on the docket sheet. The court has located these documents and will enter them on the docket sheet.

Date Filed	#	Docket Text
		TRANSCRIPT VOLUME V. (dls) (Entered: 10/28/2005)
10/27/2005	39	Order for Administrative Correction of the Record. A Clerical error has been discovered in the case record. In accordance with Fed. R. Civ. P. 60(a), the Clerk is directed to make the following administrative corrections to the record and to notify all parties accordingly. The court was sent the Transmittal of Stipulated Record on August 9, 2004. These documents were sent directly to chambers without first being entered on the docket sheet. The court has located these documents and will enter them on the docket sheet. TRANSCRIPT VOLUME VI. (dls) (Entered: 10/28/2005)
10/27/2005	40	Order for Administrative Correction of the Record. A Clerical error has been discovered in the case record. In accordance with Fed. R. Civ. P. 60(a), the Clerk is directed to make the following administrative corrections to the record and to notify all parties accordingly. The court was sent the Transmittal of Stipulated Record on August 9, 2004. These documents were sent directly to chambers without first being entered on the docket sheet. The court has located these documents and will enter them on the docket sheet.

Date Filed	#	Docket Text
		MOTION TO DISMISS TRANSCRIPT VOLUMES I & II. (dls) (Entered: 10/28/2005)
10/27/2005	41	Order for Administrative Correction of the Record. A Clerical error has been discovered in the case record. In accordance with Fed. R. Civ. P. 60(a), the Clerk is directed to make the following administrative corrections to the record and to notify all parties accordingly. The court was sent the Transmittal of Stipulated Record on August 9, 2004. These documents were sent directly to chambers without first being entered on the docket sheet. The court has located these documents and will enter them on the docket sheet. PARENT'S EXHIBITS. (dls) (Entered: 10/28/2005)
10/27/2005	42	Order for Administrative Correction of the Record. A Clerical error has been discovered in the case record. In accordance with Fed. R. Civ. P. 60(a), the Clerk is directed to make the following administrative corrections to the record and to notify all parties accordingly. The court was sent the Transmittal of Stipulated Record on August 9, 2004. These documents were sent directly to chambers without first being entered on the docket sheet. The court has located these documents and

Date Filed	#	Docket Text
		will enter them on the docket sheet. SCHOOL DISTRICTS' EXHIBITS. (dls) (Entered: 10/28/2005)
10/27/2005	43	Order for Administrative Correction of the Record. A Clerical error has been discovered in the case record. In accordance with Fed. R. Civ. P. 60(a), the Clerk is directed to make the following administrative corrections to the record and to notify all parties accordingly. The court was sent the Transmittal of Stipulated Record on August 9, 2004. These documents were sent directly to chambers without first being entered on the docket sheet. The court has located these documents and will enter them on the docket sheet. MOTION TO DISMISS EXHIBITS. (dls) (Entered: 10/28/2005)
04/04/2007		Record on Appeal (entire original file) sent to the 9th Circuit regarding Notice of Appeal CA 05-35641 28. (Related Document(s): Notice of Appeal, 28) (tomg) (Entered: 04/04/2007)
08/10/2007	44	Order from USCA for the 9th Circuit re Notice of Appeal, 28 (Related Document(s): Notice of Appeal, 28) (cib) (Entered: 08/13/2007)
06/16/2008	45	MANDATE of USCA for the 9th Circuit re Notice of Appeal CA 05-35641 28: The decision of the Dis-

Date Filed	#	Docket Text
		trict Court is REVERSED and REMANDED. (Attachments: #1 Attachment Opinion) (tomg) (Entered: 06/17/2008)
06/26/2008		Appeal Record Returned (one original volume and expando folders containing original document #s 32-43) returned from the 9th Circuit regarding Notice of Appeal CA 05-35641 28. (tomg) (Entered: 06/26/2008)
08/11/2008	46	Motion For Supplemental Briefing. Filed by T.A.. (cib) (Entered: 08/12/2008)
08/14/2008	47	**ORDER:** GRANTING Motion For Supplemental Briefing 46. Simultaneous Supplemental Briefing due by 9/15/2008. Ordered by Judge Michael W. Mosman. (dls) (Entered: 08/14/2008)
09/11/2008	48	Record of Order by Michael W. Mosman. The court will construe Forest Grove's letter as a motion for a stay and status conference. Order DENYING motion for a stay and status conference. The court, sua sponte, has extended the simultaneous supplemental briefing deadline to October 17, 2008. Future requests to be submitted, in pleading or motion format. Ordered by Judge Michael W. Mosman. (dls) (Entered: 09/11/2008)

Date Filed	#	Docket Text
09/15/2008	49	Supplemental Brief. Filed by T.A.. (cib) (Entered: 09/18/2008)
09/15/2008	50	The document, Brief 49, was conventionally filed in our court after the mandatory electronic filing deadline of September 1, 2006. Local Rule 100.1 clearly requires the electronic filing of all pleadings, documents, and other papers in all pending civil and criminal cases. The document(s) referenced above should not be refiled electronically, but we ask that you conform to the requirements of LR 100.1 in future submissions to the court. Please refer to LR 100.4 for documents which must be filed conventionally. To learn more about this requirement and the CM/ECF system, visit the court's Internet website at: ord.uscourts.gov. There you will find links to rules and resources designed to assist you and your staff in quickly learning how to electronically file. If you have any questions or concerns regarding this matter, please contact any member of the Clerk's Office staff. (cib) (Entered: 09/18/2008)
10/17/2008	51	Amended Brief Supplemental *Brief*. Filed by T.A.. (Broadhurst, Mary) (Entered: 10/17/2008)
10/17/2008	52	Supplemental Brief. Filed by Forest

Date Filed	#	Docket Text
		Grove School District. (Cohn-Lee, Richard) (Entered: 10/17/2008)
01/26/2009	53	Motion. Filed by T.A.. (Broadhurst, Mary) (Entered: 01/26/2009)
02/02/2009	54	Order that the Case is Stayed. Status Report is due 5/2/09. (dls) (Entered: 02/02/2009)
02/06/2009	55	Response to Motion to Seal *File* to Motion 53. Filed by Forest Grove School District. (Cohn-Lee, Richard) (Entered: 02/06/2009)
02/12/2009	56	Reply to Motion to Seal the Case 53. Filed by T.A. (Broadhurst, Mary) (Entered: 02/12/2009)
02/18/2009	57	**ORDER:** Denying Motion to Seal Case 53, with leave to submit a request much narrower in scope, relating to educational records. Ordered by Judge Michael W. Mosman. (dls) (Entered: 02/18/2009)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FOREST GROVE SCHOOL DISTRICT
Plaintiff-Appellee

v.

T.A
Defendant-Appellant

DOCKET ENTRIES

Date Filed	#	Docket Text
06/28/2005	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): No. setting schedule as follows: appellant's designation of RT is due 6/20/05; appellee's designation of RT is due 6/28/05; appellant shall order transcript by 7/8/05; court reporter shall file transcript in DC by 8/8/05,; certificate of record shall be filed by 8/15/05; appellant's opening brief is due 9/26/05; appellees' brief is due 10/24/05; appellants' reply brief is due 11/7/05; [05-35641] (RT)
06/28/2005	3	Filed Mary E. Broadhurst for Appellant T.A. Civil Appeals Docketing Statement served on 6/8/05 (to CONFATT) [05-35641]

Date Filed	#	Docket Text
		[05-35641] (RT)
07/19/2005	6	Filed order CONFATT (bls/clk) a settlement assessment conference will be held by telephone on 8/15/05 at 11:00 a.m. PACIFIC (San Francisco) Time. The brfing schedule previously set by the court remains in effect. [05-35641] (XX)
08/17/2005	8	Filed order CONFATT (MAC) on or before 8/19/05, aplt shall serve a written demand on aple, with a copy to the Circuit Mediator by fax at 415/556-9725. The court will initiate a further conference by telephone on 9/6/05 at 11:00 a.m. PACIFIC (San Francisco) Time. [05-35641] (XX)
09/12/2005	9	Filed certificate of record on appeal. RT filed in DC none. [05-35641] (XX)
09/20/2005	11	Filed order CONFATT (MAG) The court will initiate a further conf by telephone on 9/22/05 @ 2:00pm San Francisco Time. The brfing sch previously set by the court is amended as follows: aplt shall file an opening brf on or before 10/28/05; aplt shall file an ans brf on or before 11/23/05; aplt may file an opt reply brf on or before

Date Filed	#	Docket Text
		12/19/05 . . . [05-35641] (JI)
10/12/2005	13	Filed order CONFATT (MAC) this appeal will not be selected for inclusion in the Mediation Program. [05-35641] (XX)
10/31/2005	14	Filed original and 15 copies Appellant T.A. opening brief (Informal: no) 47 pages and five excerpts of record in 1 volume; served on 10/28/05. [05-35641] (BJB)
11/21/2005	16	14 day oral extension by phone of time to file Appellee's brief. [05-35641] appellees' brief due 12/7/05; Appellant's optional reply brief is due within 14 days of service of Appellee's brief. (LW)
12/13/2005	17	14 day oral extension by phone of time to file Appellant's reply brief. [05-35641] appellants' reply brief due 1/4/06; (KM)
12/14/2005	18	Filed original and 15 copies appellee Forest Grove School's 42 pages brief, 1 supplemental exc. vols: served on 12/7/05. [05-35641] (BJB)
01/05/2006	20	Filed original and 15 copies T.A. reply brief, (Informal: no) 25 pages and five suppl eor 1 vol; served on 1/4/06 [05-35641] (BJB)

Date Filed	#	Docket Text
01/27/2006	22	Calendar check performed [05-35641] (TH)
03/22/2007	23	Calendar materials being prepared. [05-35641] [05-35641] (TH)
03/27/2007	24	CALENDARED: PORT Wed May 9, 2007 9:00am Courtroom 2nd Floor [05-35641] (XX)
04/20/2007	26	(orig. recv'd 5/3) Filed Richard G. Cohn-Lee's faxed motion (letter) to change time of oral arg on 5/9/07 be set first on the calendar at 9am. Faxed to panel by CAL; served on 4/20/07 (CW)
05/03/2007	27	Filed order (Deputy Clerk: jf) The parties' "Joint Motion to Waive Oral Argument" is GRANTED. This case is removed from the May 9, 2007, Portland calendar and submission is deferred until May 18, 2007. The panel will retain this case. The parties are hereby ordered to file supplemental briefs addressing the following questions. For purposes of the supplemental briefs, the parties should assume that 20 U.S.C. 1412(a)(10)(C)(ii) does not create an absolute bar, under principles of equity, to recovery for private school reimbursement for students who have not

Date Filed	#	Docket Text
		"previously received special education and related services." (1) Under principles of equity, should the analysis of T.A.'s enrollment at Mount Bachelor Academy be split into two time periods: (a) the period before T.A.'s parents provided notice and a reasonable opportunity to respond to Forest Grove School district; and (b) the period after T.A.'s parents provided notice?. . . . CITE (2) If so, what is the proper analysis for the two time periods? The briefs are not to exceed 10 pages and are to be filed simultaneously within 14 calendar of the filing date of this order. (fax & file 11:30 a.m. [verified receipt]) [05-35641] (BJB)
05/09/2007	28	Case came on for submission before Pamela A. RYMER, Susan P. GRABER, Carlos T. BEA ; SUBMISSION DEFERRED. [05-35641] (ME)
05/21/2007	30	Filed original and 15 copies Appellee Forest Grove School supplemental brief of 10 pages, served on 5/17/07 (faxed to PANEL) [05-35641] (BJB)
05/21/2007	31	Filed original and 15 copies Appellant T.A. supplemental brief of 10

Date Filed	#	Docket Text
		pages, served on 5/17/07 (faxed to PANEL) [05-35641] (BJB)
08/08/2007	33	Filed order (Pamela A. RYMER, Susan P. GRABER, Carlos T. BEA,): This case shall continue to be deferred pndg the Supreme Ct's decision whether to grant cert in *Frank G. v. Board of Education* (CITES). If the Supreme Ct grants cert, this case shall be deferred pndg the Supreme Ct's decision. In the meantime, the case is referred to the circuit mediation program for 60 days to explore the possibility of resolving the dispute through mediation. A circuit mediator will contact counsel directly the arrange a conference. . . The parties shall file a status rpt before the end of the 60-day period on the status of settlement negotiations. [05-35641] (GR)
08/14/2007	35	Filed order CONFATT (MAC) Pursuant to the order of this court, filed August 8, 2007, referring this case to the Circuit's mediation office, a conference call will be held on August 16, 2007 at 11:00 am to explore the possibility of resolving the dispute through mediation. The Circuit Mediator will initiate the call. Procedures governing the con-

Date Filed	#	Docket Text
		ference and the Mediation Program are discussed in the attached memorandum. Csl are expected to familiarize themselves with the information in the memorandum. All participants in the conference shall comply with the confidentiality provision set forth in Paragraph 1. [05-35641] (SW)
09/10/2007	36	Filed Forest Grove School, T.A.'s status report, served on 9/10/07 (PANEL) [05-35641] (BJB)
09/18/2007	37	Filed order (Pamela A. RYMER, Susan P. GRABER, Carlos T. BEA,): This case shall continue to be deferred pending the Supreme Court's decision in *Board of Education v. Tom F.*, 193 F. App'x 26 (2d Cir. 2006) (unpublished disposition), cert. granted, 127 S. Ct. 1393 (2007). [05-35641] (BJB)
10/17/2007	39	Filed order CONFATT (MAC) Csl for the aplt shall contact the mediator, by email (Margaret _Corrigan@ca9.uscourts.gov) or phone, 415.355.7905 within 10 days of the dispo by the USSC of *Frank G. v. Board of Education* 06-580, after which a further conf will be scheduled. [05-35641] (CW)

Date Filed	#	Docket Text
10/24/2007	41	Filed order CONFATT (MAC) The court will initiate a further conf by telephone on 11/9/07 at 2:00 p.m. PST. Prior to the next scheduled conf call, csl for the aplt shall serve on the Circuit Mediator (fax no: 415-355-8566) a copy of the status report which was submitted to the court on 9/10/07. [05-35641] (BJB)
10/30/2007	42	Filed order CONFATT (MAC) The further conference prev set for 11/9/07, is rescheduled to 11/8/07, at 2:00 p.m. Pacific Time. Prior to the next scheduled conf call, csl for aplt shall serve on the Circuit Mediator (fax no: 415-355-8566) a copy of the status report which was submitted to the court on 9/10/07. [05-35641] (BJB)
01/14/2008	43	Filed order (Deputy Clerk: jf) This case is scheduled for oral argument on Tuesday, March 11, 2008, at 3:00 p.m. in Portland, Oregon. The parties will be allotted 15 minutes per side for argument. (phone & file 3:21 p.m.) [05-35641] (BJB)
01/15/2008	44	CALENDARED: Portland March 11 2008 3:00 p.m. Courtroom 2nd Floor [05-35641] (TH)

Date Filed	#	Docket Text
03/11/2008	45	ARGUED AND SUBMITTED TO PAMELA ANN RYMER, SUSAN P. GRABER and CARLOS T. BEA. (ME)
04/28/2008	47	FILED OPINION (PAMELA ANN RYMER, SUSAN P. GRABER and CARLOS T. BEA) REVERSED AND REMANDED. [Reversed/Vacated; Terminated on the merits after oral hearing; Written, reasoned, signed, published; Judge: PAR Dissenting, Judge: SPG Authoring, Judge: CTB On Panel But Did Not Write]. FILED AND ENTERED JUDGMENT. (RP)
05/12/2008	48	Filed original and 50 copies of Appellee Forest Grove School District petition for panel rehearing and petition for rehearing en banc Number of Pages 8. Served on 05/09/2008. Date circulated to the court: 05/13/2008 (PANEL-ACTIVE JUDGES-ANY INTERESTED SENIOR JUDGES) (TB)
06/05/2008	49	Filed order (PAMELA ANN RYMER, SUSAN P. GRABER and CARLOS T. BEA): Judges Graber and Bea have voted to deny the petition for panel rehearing, and Judge Rymer has voted to grant it. The panel has voted to deny the

Date Filed	#	Docket Text
		petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it. The petition for panel rehearing and petition for rehearing en banc are DENIED. (WL)
06/13/2008	50	MANDATE ISSUED.(PAR, SPG and CTB) (TB)
07/18/2008	51	Received Appellee Forest Grove School District motion to stay the mandate. Served on 07/15/2008 (Faxed to PANEL) (TB)
07/29/2008	52	Filed order (PAMELA ANN RYMER, SUSAN P. GRABER and CARLOS T. BEA) Plaintiff-Appellee's Motion to Stay Mandate is DENIED as untimely. (WL)
09/12/2008	53	Received notice from the Supreme Court: petition for certiorari filed on 09/03/2008. Supreme Court Number 08-305. (TB)
01/23/2009	54	Received notice from the Supreme Court. Petition for certiorari GRANTED on 01/16/2009. Supreme Court Number 08-305 (SW)

FOREST GROVE SCHOOL DISTRICT

Referral for Special Education (5-21)

Date 4/21/05

Student's Name [redacted] Birthdate (mm/dd/yy)

School Forest Grove High Student ID# [redacted] Grade 9

Parent or Guardian Name [redacted] Home (W) [redacted] Home (H) [redacted]

Address [redacted]

Referring Person: Parent Phone:

1. Check the specific area of concern related to each area of concern listed the work samples, information or evidence that will help the MDT plan an evaluation. Please provide the MDT with this information. You may attach work samples or a summary of specific skills in each area that are a concern.

- ☑ Cognitive development/mental abilities - standardized test scores, description of student's skills, rate of learning
- ☑ Reading - fluency rate, unit tests, comprehension work samples, achievement test scores
- ☑ Written Language - examples of composition (best, worst, typical), dictation, copying (near and far), spelling
- ☑ Math - work samples, achievement tests, fact fluency rates
- ☑ Communication - description of the speech or language problem (receptive or expressive)
- ☐ Classroom Performance - grades in areas of concern, tests, work samples, rate or work completion
- ☑ Study Skills - description of organizational skills, grades, use of texts
- ☐ Social Behavior - behavioral referrals, anecdotal history, observations
- ☐ Motor Skills - description of skill level in PE or gross motor skills, writing sample or description of fine motor skills
- ☐ Hearing
- ☐ Vision
- ☐ Self-Help Skills - description of dressing, eating, toileting skills
- ☐ Other

2. Review the student's records for pertinent information:

Previous ed history:

Previous report cards: 8th gr - mostly Cs, F in math 3rd qtr - 47% R. 14% S. 20% M. poor test performance missing org work

Group Achievement Tests: 7th gr all but 2 of 230 no skill problem solving 5 and 8th gr 6: writing 35+45 no doing all screen but 1 >230 100 #

Attendance/Health: Lots of absences, previous surgeries

Primary Language: English

3. Describe any interventions used to try to remediate the problem: tried a variety of testing styles. Was able to read. Tutorial assistance, smaller classroom, moved closer to the teacher. Discuss study strategies with parent. Allow extra work time without penalty.

Action by MDT:

Describe what action will be taken

Indicate who will take the action and when

Indicate the date the parent was notified of the referral (mm/dd/yy)

EXHIBIT 11
PAGE 1 OF 14

27

BEST AVAILABLE COPY

WIAT
WECHSLER INDIVIDUAL ACHIEVEMENT TEST

Record Form

Summary

DOB [redacted]

Child's Name [redacted]
School ELLIS
Teacher Hunter
Referral Source Peacock
Reason for Referral
Behavioral Observations Cooperative, quick, pleasant.

Sex M
Grade 4th

	Year	Month	Day
Date Tested	01	05	01
Date of Birth	[redacted]		
Age			

(age) Gr.

WIAT Subtests

	Age ☐ Grade	Raw Scores	Standard Score	Confidence Interval [redacted]%	Percentile	Other ☐ Age ☐ Grade ☐ NCE	Gr.
Basic Reading		[redacted]	97	-	42nd	13.9	8.3
Mathematics Reasoning			91	-	27th	13.3	7.3
Spelling			89	-	23rd	12	6.1
Reading Comprehension			125	-	95th	≥19.11	>9.9
Numerical Operations			74	-	4th	10.9	5.6
Listening Comprehension			-	-	-	-	-
Oral Expression			-	-	-	-	-
Written Expression			109	-	55th	16.6	11.6

Composites

	Age ☐ Grade	Reading [redacted]	Mathematics [redacted]	Writing [redacted]	[redacted]
Sum of Raw Scores		[redacted]	[redacted]	[redacted]	[redacted]
Standard Score		108	81	93	[redacted]
Confidence Interval [redacted]%		[redacted]	[redacted]	[redacted]	
Percentile		70th	10th	32nd	
Other ☐ Age Equivalent ☐ NCE		12.7	6.4	8.4	

THE PSYCHOLOGICAL CORPORATION
Harcourt Brace & Company
Copyright © 1992 by The Psychological Corporation

EXHIBIT B1
PAGE 5 OF 14

FOREST GROVE SCHOOL DISTRICT

Statement of Eligibility for Special Education
(Specific Learning Disability 90)

Date: 8/13/01

Student's Name [redacted] Birthdate: [redacted]

School Forest Grove High School Date of Initial Eligibility:

Student ID # [redacted]

The team has obtained the following evaluation data (from documentation 1-8):

1. An observation by other than the student's regular teacher, of the student's academic performance in a regular classroom setting or in the case of a child less than school age or out of school, an observation in an age-appropriate environment.

Jerre Ann Pappone, Special Educator	4/23/01	8/13/01
Examiner	Date Conducted	Date Reviewed

Relevant behavior noted during observation, and its relationship to academic functioning:
[redacted] worked quietly and independently during the observation. He was appropriate the entire time. Teacher made a comment on his assignment and [redacted] took the directions and continued to work.

2. A developmental history, if needed:

I would prefer Dr. Will	6-12-01	6-12-01
Examiner	Date Conducted	Date Reviewed

3. An assessment of intellectual ability:

Vinny Martin, School Psychologist	Woodcock Johnson III Tests of Cognitive	5/7/01	8/13/01
Examiner	Assessment	Date Conducted	Date Reviewed

4. Other assessment of the characteristics of learning disabilities if the child exhibits impairments in cognition, fine motor, perceptual motor, communication, social, emotional, perception or memory:

J. Isuchika to Phillips/Medina	6-8-01	6-13-01
Examiner Assessment	Date Conducted	Date Reviewed

5. A review of the student's cumulative records, previous individualized education programs or individualized family service plans and teacher collected work samples:

Lorna Shuhler, Special Education	5/1/01	8/13/01
Examiner	Date Conducted	Date Reviewed

6. If determined necessary, a medical assessment or health assessment statement indicating whether there are any physical factors that may be affecting the student's educational performance:

Examiner	Date Conducted	Date Reviewed

Relevant medical findings:

7. Assessments that are necessary to determine the impact of the suspected disability:

Lorna Shuhler, Special Educator	Woodcock Individual Achievement Test	5/1/01	8/13/01
Examiner	Assessments	Date Conducted	Date Reviewed

8. Additional evaluations or assessments that are necessary to identify the student's educational needs:

Examiner	Assessments	Date Conducted	Date Reviewed

581-81 X (Rev. 7/99) Distribution: 1-Pupil Ed. Record, 2-Parent, 3-Special Ed. File FS17D

EXHIBIT B1
PAGE 13 OF 19

FOREST GROVE SCHOOL DISTRICT

Statement of Eligibility for Special Education
(Specific Learning Disability 90)

Student's Name [redacted] Date: 6/13/01

The student meets ALL of the following criteria.

☐ Yes ☑ No The student does not achieve commensurate with his or her age and ability level, AND

☐ Yes ☑ No The student has a severe discrepancy between intellectual ability and achievement, which is not correctable without special education, in one or more of the following areas:

- ☐ Oral expression
- ☐ Listening comprehension
- ☐ Written expression
- ☐ Basic reading skills
- ☐ Reading comprehension
- ☐ Mathematics calculation
- ☐ Mathematics reasoning

The student's discrepancy ☐ *is* ☐ *is not* primarily the result of a visual, hearing, or motor impairment, mental retardation, emotional disturbance or environmental, cultural, or economic disadvantage.

The team has determined that: Does not have a specific learning disability.

☐ Yes ☑ No 1. The student has a specific learning disability. If so, this determination is based on:

☐ Yes ☑ No 2. The student's disability has an adverse impact on the student's educational performance when the student is at the age of eligibility for kindergarten through age 21, or has an adverse impact on the child's developmental progress when the child is age three through kindergarten; and

☐ Yes ☑ No 3. The student needs special education services

4. The Eligibility Team has considered the student's special education eligibility, and determined that the eligibility ☐ *is* ☐ *is not* due to a lack of instruction in reading, math or due to limited English proficiency.

The team agrees that this student ☐ does ☑ does not qualify for special education in the area of Learning Disabled.

Signature of Team Member	Title	Agree	Disagree
[illegible]	Spec. Ed. Teacher	☑	☐
Penny Martinell	School Psych	☑	☐
[redacted]	Parent	☑	☐
[illegible]	Special Education	☑	☐
		☐	☐
		☐	☐
		☐	☐
		☐	☐

This is a ☐ primary ☐ secondary [illegible] consideration.

☐ A copy of the evaluation report and the eligibility statement is given to the parent(s).

Form 581-81 X (Revised 7/98) White - Student File Blue - Parent Yellow - Case Manager

EXHIBIT R1
PAGE 14 OF 14

Michael J. Fulop, Psy.D.
Behavioral Diagnostics & Treatment
5440 SW Westgate Drive, Suite 175.
Portland, Oregon 97221-2420
E-mail: mjfulop@hotmail.com
Oregon Psychology License #1049

Patient:	[Redacted]
Date of birth:	[Redacted]
Age:	[Redacted]
Patient Grade:	11th
Assessment Date:	1-31-2003
Date of Report:	3-15-2003

Psychological Assessment Report

[Redacted] was referred by Dr. Susan Patchin, and his parents [Redacted] and [Redacted] for a comprehensive psychological assessment. The purpose of the assessment was to determine why [Redacted] was experiencing such an odd pattern of behavior including depressive ideation, irritability, impulsiveness, and over-dependence on his family

Assessment Procedures:
Attention Deficit Hyperactivity Disorder Rating Scale-IV
Behavior Assessment System for Children - Plus
Clinical Interview with [Redacted]
Connors Continuous Performance Test
Controlled Oral Word Association Test
Developmental Information Form
Family Adaptability and Cohesion Scale-III
Family Information Form
Family Inventory of Life Events and Changes
Minnesota Multi phasic Personality Inventory - Adolescent
Personal Information Form

Peabody Picture Vocabulary Test
Review of Records provided by [Redacted]
Rey Osterrieth Complex Figure Test
Substance Abuse Subtle Screening Inventory
Trail Making Test Part A & B
Wechsler Adult Intelligence Scale - Third Edition
Wide Range Assessment of Memory and Learning [Selected Subtests]
Woodcock Johnson Tests Third Edition - Achievement
Wisconsin Card Sorting Test

Goals: The goals for this assessment for [Redacted] and [Redacted] are to:

- Determine the type of depression or disorder [Redacted] might suffer from.
- Identify triggers for [Redacted] difficulties with depression and irritability.
- Find appropriate responses for both [Redacted] and his parents when his moods become out of control and determine an overall plan for [Redacted] immediate future and therapy.

Developmental History and Background Information: This background information was provided by [Redacted] and [Redacted]. [Redacted] lives with his mother, [Redacted] and his father, [Redacted], in Forest Grove, Oregon. He attends the 11th grade at Forest Grove high school. Also in the family is his sister, [Redacted] age [Redacted], who is in college. [Redacted] works as a business owner and has obtained a A.A.S. degree. [Redacted] and has also obtained an A.A.S. degree.

Pregnancy, labor and delivery were unremarkable for [Redacted] and [Redacted] with [Redacted]. [Redacted] did not sleep much for an infant, and was

considered a predictable yet fussy & difficult baby. [Redacted] met early developmental milestones at approximately average ages, although in the first 3 years cried intensely on leaving home or with a change of routine. Early medical history was unremarkable. [Redacted] physician is Dr. Marilyn Booth.

[Redacted] has been to other therapists for problems related to depression and anger. Previous therapists include Dr. Meg Eastman of the Children's Porgram [sic], and Dr. Susan Patchin. His reaction to Susan has been positive.

The negative behavioral history for [Redacted] is extensive. [Redacted] and [Redacted] endorsed the following concerns for him: not minding, temper tantrums, low self-esteem, gives up easily, whining, compulsive behaviors or rituals, lack of friends, arguing, lying, drug use, hitting, stomach-aches, moodiness, disorganization, difficulty sleeping, verbal fighting, headaches, antagonistic with parents and having no respect for parents's personal property.

[Redacted] complies with requests the first time [Redacted] and [Redacted] ask about 0 times on average. [Redacted] and [Redacted] must remind [Redacted] to complete the task 4 times. [Redacted] needs to be disciplined several times per week, when he has to do something not of his choice. For discipline, his parents use ignoring, yelling, lecturing and a reward system. When disciplined, [Redacted] usually reacts in a negative manner.

School History: As noted [Redacted] now attends the 11th grade in a regular classroom. [Redacted] has never been held back. He has attended 4 schools. Individual testing was conducted in the 9th grade, for

a learning disability. He was determined to not have a learning disorders [sic] according to the school. [Redacted] grades last term were A's through F's and his grades have showed some precipitous change through the last two years, but there has been some improvement of late. [Redacted] behavior in school is generally fine, although he was suspended on an undetermined date for bringing a knife to school. Getting [Redacted] to complete homework process is moderately hard. He did not generally complete homework until recently when his parents confronted him more. He said that he works a great deal on his homework, but his parents don't know whether he hands it in or completes it. His mother writes that until this term, [Redacted] consistently avoided school work whatsoever.

Family & Genetic Issues: [Redacted] nuclear family history is positive for depression. His extended family members have suffered from the following problems: alcohol and drug abuse, learning problems, anxiety problems, and psychiatric hospitalizations.

Leisure and Pleasurable Activities: [Redacted] likes music, art, books, movies and family gatherings and activities. [Redacted] reads on a daily basis. [Redacted] and [Redacted] describe [Redacted] as a deep thinker, good with his young cousins, having good common sense and talented. Activities completed as a family are talking, having fun, family outings and going to bookstores. [Redacted] watches about 2 hours of TV per weekday, and about 2 hours per weekend day. Typical TV fare for [Redacted] is comedy or the Discovery channel. [Redacted] does not have access to a computer at home, but uses it sometimes at his mother's workplace.

Peer Relations: [Redacted] best friend is his cousin, who lives in Alaska. [Redacted] socializes with his peers at school, but he does not maintain relationships outside of school, choosing to spend all his non school time at home or with his family.

Interviews: These interviews were conducted with Mr. and Mrs. [Redacted] present for the most part. Some of the interviews were completed with [Redacted] during and throughout the testing procedures.

[Redacted] starts by reporting that [Redacted] is often irritable, depressed and hates school. He frequently complains about it and seems to be very moody and angry a lot. He does not respect other people's property, doesn't eat well and has problems sleeping. His world is quite chaotic and messy and he does not seem to be able to put anything away. [Redacted] is often contrary and very much in a bad mood and often doesn't like to do family things. He seems from her perspective to "try to get everybody into a bad mood". When he is asked to do things he complains that his parents are nagging him and sometimes has long tirades, and further will not let items drop: he keeps going over and over them until everyone is sick of it.

Mr. [Redacted] report [sic] that they have been forced to micro-manage [Redacted]. Nonetheless it is still difficult to get [Redacted] to move. He always makes other people wait. He seems to have a lack of motivation. He nonetheless seems to enjoy and crave extended family time. He has very few personal boundaries and he takes things such as razors, dental floss, fingernail clippers, etc. He always enjoyed private time as a kid and he currently rarely likes to

have other kids over. He claims that he has a lot of friends, but no one ever comes over.

[Redacted] interjected here that he recently told them that he was smoking pot even though he had denied it in the past. Both extended families have addiction problems. [Redacted] is apparently often angry and irritable, has difficulties adjusting to change and seems to be depressed to his mother. [Redacted] said that he is often irritated with something and it is sometimes a mystery to him as to what irritates him. It should be noted here that as [Redacted] is talking the inter-word duration is quite long and he could be considered to show some paucity of speech. He said he gets irritated when someone tells him something he already knows and somebody feeds him stuff he doesn't want to hear. He doesn't like it when his parents remind him of things he should do such as getting up or going to sleep. He doesn't like to be instructed at all and this seems to make him quite angry.

[Redacted] said that what he would like to do in life is play guitar, write, paint, draw, music and something artistic. His parents said that he has a good sense of humor and he is sarcastic and his favorite comedian [sic] are people like Jim Carey, Adam Sandler and Steve Martin. He does not currently drive and has no license.

When asked what he likes about himself, [Redacted] says slowly that he gets along with everybody and everything, there is not much he doesn't like and I am fun to be around. When asked about what bad habits he has, he said not keeping my room clean and maybe marijuana. The mom says that he is kind, sweet, silly, funny, fun to talk to, artistic and talented and kind of critical. The latter

of course is not a compliment, but indicates that he is somewhat perfectionistic. [Redacted] indicates that his son is a very good person who is caring, attentive, takes good care of his cousins and little children like him a great deal.

[Redacted] denies rituals or obsessions, although he does take long showers and his parents do admit that he does check in mirrors a lot and checks his room and checks other things frequently. He is not able to be very non-kinetic, and his parents indicate that he has never eaten a meal without getting up at least once or twice. According to his mom and dad [Redacted] fidgets a lot everywhere and is often quite impulsive.

Overall, [Redacted] and [Redacted] said that what they desire in this evaluation is to [sic] a clarifying diagnosis and to clarify whether he has certain types of a depressive disorder. As well they are looking for a treatment plan and to clarify what [Redacted] will need in terms of school, home and independence skills. They also want to specifically rule out bipolar disorder and unipolar depression and figure out a way to "not micro-manage him."

As noted earlier, [Redacted] pace of speech has always been quite slow and they cannot seem to get him to speed up, although they do notice that around other kids he is more talkative. The parents say that he is much more motivated this year than he has been in the past. For example, he has taken guitar lessons in the past but has never learned to actually finish a song. His parents report that there have never been any manic episodes that they have noticed. Also, no true obsessive or compulsive type of symptoms are present

His family has been involved in treatment with Dr. Susan Patchin for several years and he has not been in any other treatment, except he was worked up at the Children's Program for an ADD evaluation.

Record Review: When [Redacted] was in the ninth grade, [On 06/01] a psychological evaluation was completed by the Forest Grove School District. This included a Wechsler Achievement Test, a Woodcock Johnson Test of Cognitive Ability among other procedures. The psychologist indicates that this was a valid and reliable assessment. Highlights indicate that [Redacted] "overall cognitive efficiency" was at a standardized score of 71 at the 3rd percentile. His verbal ability was measured at 111, though his working memory was at 84. Anything that seemed to involve working memory was quite difficult for [Redacted]. On the Wechsler Individual Achievement Test, his basic reading was at 97, math reasoning 91, spelling 89, reading comprehension at 125, numerical operations at 74 and written expression at 102. The composite scores indicate reading of 108, mathematics at 81 or the 10th percentile and writing at 93 or the 32nd percentile. The examiner indicated, "It appeared evident that motivational factors played a significant role in [Redacted] functioning. Conclusions were that [Redacted] was determined not eligible as learning disabled at an eligibility meeting and that they might reconsider the eligibility at a future date.

The most recent official grade report from the Forest Grove School District indicates that [Redacted] grades range from a D in Spanish III and photography, to an incomplete in Art, to a B in American History and three C's in English, and Optimist, and Algebra.

Behavioral Observations during Testing and Interviews: [Redacted] is a [Redacted] year old that engaged oddly and diffusely with the examiner. It took him a great deal of time to respond and his speech latencies were exceptionally long. He also did not produce a great deal of talk, though when I was testing him he seemed to do somewhat better than when with his parents and I. He seemed rather spacy at times and not tuned into the process as well as one might expect. His affect was generally very stable, but very constricted as well. His overall mood would have to be considered to be slightly depressive, though he claimed that he felt quite positive. He often fidgeted with hands and feet with very small movements, though this did not seem to distract him. His responses were slow on most items and he would suffer some in his scores because of his slow speed.

He often talked to himself subvocally. He made one rather egregious error on the Block Design subtest. He separated the blocks on the final one in a manner that was not close to what the block on the card showed. There was a lot of trial and error in his block designs solutions. [Redacted] provided some odd answers throughout the intelligence tests. This was not so much because they were strange, but because he seemed to lose the set of the task. For example for the question "Name three types of blood vessels in the human body", [Redacted] stated "veins, arteries, and hearts".

Overall, [Redacted] seemed to engage as well as he could, but it did not seem to be his absolutely best effort because he remained quite obtuse to the process. Nonetheless, test results would indicate that he did work up to his ability level and seemed to put forth his best overall effort. Therefore the test

results are considered a valid and accurate representation of his cognitive, academic, and personality functioning at this time.

Cognitive Test Results: Please refer to test results presented in Appendix A. [Redacted] completed all testing after having taken no medication.

On the Wechsler Adult Intelligence Scale 3rd Edition [Redacted] scored within the average range of intellectual functioning. [Redacted] Full Scale Intelligence Quotient was measured at 102, 55th percentile; his Verbal Intelligence Quotient was measured at 96, 39th percentile; and his Performance Intelligence Quotient was at 110, 75th percentile. The difference between his Performance IQ approached one standard deviation and though it is most likely significant, it is not clinically meaningful. Inspection of the Factor scores demonstrates generally similar scores in Verbal Comprehension, Perceptual Organization, and Processing Speed. Nonetheless, his Working Memory score was quite below where expected. This indicates that holding and operating on information in the numeric and symbolic channels will be quite poor. This type of working memory problem can be seen as one sign of attention deficit disorder.

Strengths on the intelligence tests included Comprehension, the ability to understand social norms and reasoning, and Picture Arrangement a similar type of skill, though including social sequencing. The only weakness on the test statistically was the Arithmetic Subtest, though Letter/Number Sequencing approached the weakness. Overall, [Redacted] intelligence measured squarely in the average range.

On the Wide Range Assessment of Memory and Learning, information of different kinds (visual, verbal) is presented to [Redacted] and removed, and the child is asked to recall as much information as possible. This set of tests assesses how effectively material is encoded in memory. [Redacted] score on the screening memory was measured at 93 or the 32nd percentile, somewhat below his Full Scale IQ, though not atypical in this clinic.

On the Wisconsin Card Sort, [Redacted] was asked to sort stimuli into categories, without specific instructions. This complex task measures various aspects of executive function and requires the ability to retain information as stimuli change, applying it to new problems, the ability to shift sets flexibly, and the ability to sustain focus. [Redacted] scores all fell within a range consistent with his IQ, though he did have two failure [sic] to maintain set errors which is significant and consistent with inability to pay attention.

On the Rey Complex Figure Test (administered and scored using Meyers & Meyers' Method, PAR), [Redacted] was asked to copy and later to draw from memory a complex geometric figure. Poor performance may reflect poor planning or poor visuospatial organization skills. [Redacted] score on the copy drawing was in the average range as was the recall drawing.

On Trails A, [Redacted] was asked to connect circled numerals in order by drawing lines with a pencil as quickly as possible, and on Trails B, to connect circled numerals and letters in order by drawing lines with a pencil as quickly as possible. Trails A assesses rapid visual scanning; Trails B assesses the ability to shift mental sets, and to hold

two sets of ordered stimuli in mind simultaneously (divided attention). The ability to perform these tasks quickly may be related to efficient attentional operations. [Redacted] time on Trails A fell in the low average range and his time on Trails B fell in the borderline range. Clearly, the visual search function is a problem for him.

On the Controlled Oral Word Association Test, a test of word fluency [Redacted] was asked to think of as many words as possible in one minute, beginning with specific letters. This task is a measure of verbal executive function, in that it requires the child to generate a search strategy for maximal success. On this task, [Redacted] scored in the borderline range and it is not surprising given the fact that his speech production is so low. This is an executive functioning task in the verbal channel, that he obviously does not do well. He also showed an interesting pattern whereby his performance declined rather than improved. Most people reverse that pattern.

On the Connors Continuous Performance Test, [Redacted] was asked to scan a computer screen for specific letters; the task is a measure of sustained attention and impulsivity. Poor performance is associated with attentional problems. [Redacted] score on this measure indicates some signs of having and some of not having visual attention problems. Statistically, there is not a significant visual attention problem on this measure.

On the Woodcock Johnson Tests Third Edition Achievement & Cognitive Tests, [Redacted] was asked to respond to short items and problems in reading, math and written language. Achievement levels are measured in a one-to-one context, with the examiner providing instructions and prompts to move

from one problem to the next. Scores thus reflects [Redacted] ability to perform under ideal circumstances, and do not necessarily predict classroom performance. The Woodcock Johnson Achievement Test results demonstrate that [Redacted] Broad Reading is approximately ten points below his Full Scale IQ, though his math skills are significantly lower than his IQ. He is also quite slow in his reading processing and his overall academic fluency [measures of speeded processing in both math and reading.] These scores indicate a discrepancy based math disability, and some problems in reading skills.

Cognitive Summary: Overall, [Redacted] is squarely in the average range with his cognitive performance on most measures including overall intelligence, though his working memory, maintaining set, visual search, and word production are all quite low in comparison. In addition, a math disability seems to be present for him, though this may be more in the range of both calculation and math speed, and though some reading problems are also present particularly when speed is required.

Personality Test Results: The Behavior Assessment for Children-Plus compares teacher, parent, and self-report responses to a national normative sample. From scores reported below, [Redacted] is seen by his parents as evidencing problems in hyperactivity, aggression, conduct, anxiety, depression, and attention. He is also considered emotionally and socially withdrawn from both of them, and externalizes and internalizes his problems. Both parents' Behavioral Symptom Index [BSI] is quite high because of these rankings. Thus the conclusions

are that [Redacted] has a wide range of behavioral problems that other adolescents his age do not show.

[Redacted] own rankings indicates that he views himself as having a trend towards the positive. He does seem [sic] himself as quite self-reliant, but generally and otherwise free of emotional symptoms. On both scales only statistically significant scores are important; these are reported in percentiles: a bold score indicates the at-risk range, and a bold italicized score indicates significance].

Scale Name	[Redacted]	[Redacted]
Hyperactivity	*99*	*99*
Aggression	91	93
Conduct Problems	*95*	90
Anxiety	94	86
Depression	*98*	94
Somatization	83	78
Attention Problems	*96*	*99*
Atypically	*95*	80
Withdrawal	*99*	*99*
Externalizing	*98*	*97*
Internalizing	*97*	93
Social Skills	10	16
Leadership	22	22
Behavioral Sx index	*99*	*98*
Adaptive Skills	13	17

Behavior Assessment System for Children-plus *SELF-* Report for [Redacted]

Attitude to School	64	Relations with Parents	45
Attitude to Teachers	59	Interpersonal Relations	78
Sensation Seeking	4	Self Esteem	37
Atypicallty	45	Self Reliance	82
Locus of Control	58	School Maladjustment	35
Somatization	10	Clinical Maladjustment	34
Social Stress	46	Personal Adjustment	68
Anxiety	32	Emotional Symptom's index	48
Depression	64	Sense of Inadequacy	70

Minnesota Multi phasic Personality Inventory-Adolescent [Redacted] omitted 15 items on the Minnesota Multi phasic Personality Inventory-Adolescent; although this is not enough to invalidate the resulting Minnesota Multi phasic Personality inventory-Adolescent profiles, some of his scale scores may be artificially lower because of these omissions. This is a valid profile. His responses to the Minnesota Multi phasic Personality Inventory-Adolescent validity items suggest that he cooperated with the evaluation enough to provide useful interpretive information. The resulting profiles are an adequate indication of his present personality functioning.

Adolescents with this Minnesota Multi phasic Personality Inventory-Adolescent clinical profile who are being evaluated in an outpatient setting are likely to have some behavior problems. These may include family discord, school-adjustment problems, risk-taking behaviors, or conflicts with authority figures. However, his clinical profile is only moderately elevated on Pd. This elevation is not as extreme as one would expect in a clinical setting. Only limited information is available from the clinical profile.

This Minnesota Multi phasic Personality Inventory-Adolescent clinical profile contains the most frequent high point, the Pd score, among clinical samples. Over 25% of boys in treatment have this well-defined profile (i.e., with the Pd scale at least 5 points higher than the next scale). Less than 4% of boys in the normative sample have this well-defined high-point profile. He states that he enjoys being around people. He likes social attention and prefers to spend time with others rather than being alone. The relative scale elevation of the highest scale (Pd) in his clinical profile reflects high profile definition. If he is retested at a later date, the peak scores on this test are likely to retain their relative salience in his profile pattern.

[Redacted] clinical scales profile suggests that he views his adjustment as adequate and probably does not feel the need for mental health treatment at this time. If he is being considered for treatment, perhaps at someone else's insistence, his motivation to change his behavior may need to be discussed with him before treatment can proceed effectively. He did endorse content suggesting a desire to succeed in life. There may be some positive aspects about school that could be reinforced. This could be an asset to build on during treatment.

Rorschach Inkblot Test [Exner System]: Responses for [Redacted] were not considered to provide a valid profile. However content analysis indicated some higher rates of content with a passive type of appositional thoughts, and some depressive content.

Substance Abuse Subtle Screening Inventory: [Redacted] profile indicated substance abuse for drugs as his score was over 70-T. Though he is not classified as drug dependent in this measure, he clearly shows some signs of being drug abusing.

Personality Functioning: Overall, [Redacted] is a [Redacted] year old whose personality is rather unformed at this age. He is socially immature, isolates, and sees himself to be much more independent than he is. The presence of a depressive disorder is notable along with the presence of some attitudes of discontent and acting out towards his family. But for the most part, he is most likely suffering from a primary alcohol and drug problem, specifically marijuana, which is clouding his judgement and increasing his level of denial.

Family Measures: All measures were within normative limits on family measures.

Specific Types of Learning Problems Present

- Auditory Memory
- Auditory Discrimination
- Expressive Language
- Organization
- Combinations of the above.

Functional Limitations Academically:

- Reading Speed
- Timed Tests
- Spells poorly.

- Confusion with number sequencing: Hearing 233 instead of 332
- Difficulty with equations.
- Difficulty expressing themselves. very slow in speech.
- Organization skills; Incomplete work, Incomplete assignments.
- Unorganized Note Taking
- Cannot use Outline
- Poor recall of material.

Case Conceptualization:

Overall, [Redacted] is a [Redacted] year old referred for a comprehensive psychological evaluation by his parents and Dr. Susan Patchin. He cooperated well with the assessment procedures, but he related rather oddly to the examiner. He seemed to try as hard as he could, though that at times that might have been variable. Thomas was recently found smoking marijuana and running away from his home among other longstanding problems.

[Redacted] has been treated in the past with Zoloft. His parents report that he continues to be negative, hostile, and acting out in more difficult ways. One of the diagnostic issues requested to be clarified was whether bipolar disorder was present. Clearly, there is no evidence for bipolar disorder at this time. There is however, evidence of marijuana abuse, a math disorder, and an attention deficit disorder, the latter combined subtype. Also, his personality is such that he is quite able to tune out objective feedback from the world, about himself and portray himself to himself in a rather muted grandiose manner.

At the writing of this particular report [Redacted] has completed the Catherine Freer Wilderness Pro-

gram in Albany, and is reportedly doing much better. He is slated to attend the Mt. Bachelor Academy Program soon.

Formal Diagnostic impressions for [Redacted]

Axis	Diagnoses	Comments
Axis I	1. Attention deficit hyperactivity disorder, combined subtype. 2. Dysthymic disorder. 3. Math disorder. 4. Cannabis abuse.	1. 2. 3. 4.
Axis II	Dependency features.	
Axis III	No diagnosis.	
Axis IV	Low Moderate Severe	
Axis V	Current Global Assessment of Functioning = XX Past Year Global Assessment of Functioning = XX	

Recommendations:

Medical:

1. A medication evaluation is recommended for [Redacted] to aid in his problems in inattention, disorganization, academics, working memory, and depression. I would refer [Redacted] to James Hancey, M.D. at 503-494-6173 for medication management and adjustment.

Therapeutic/Academic:

2. I would recommend that [Redacted] attend the Mt. Bachelor treatment program in Redmond, Oregon. It will provide a positive environment that will facilitate [Redacted] to integrate

social, anti-drug, and pro-independence skills, while working on his academic and therapeutic challenges.

3 When and if [Redacted] does return to public school, he and his parents would benefit from meeting with the school at the beginning of each year to review goals, discuss likely problems, and strategies to work through the problems. Regular brief meeting [sic] between [Redacted] and his advisor and core teachers to keep abreast of goals, progress, and needs is recommended.

4. The Multi-Disciplinary Team at [Redacted] school should consider him for special educational services based upon eligibility criteria for his learning disabilities, and Attention Deficit Hyperactivity Disorder as well as his depressive disorder, and drug and alcohol problems.

5. The following school accommodations [if back at public school, though they should be integrated into the Mt. Bachelor Academy curriculum for him] are recommended for [Redacted] to aid in his development of academic and organizational skills.

   - Shortening homework assignments.
   - Sending home a week/month's assignments in advance.
   - Grade on content, not appearance or spelling.
   - Making an organizational check of assignment sheet materials in school
   - Tests: Direct training in SQ4R method for test preparation

- Permit [Redacted] extra time during tests and standardized tests such as the SAT and ACT.
- Let [Redacted] take test in non-distracting environment
- Permit short breaks during tests
- Adjust grading criteria
- Permit [Redacted] to retake tests
- Highlighting main ideas in the text
- A language Waiver for [Redacted] is recommended because of his difficulty with auditory memory, and organizational skills.
- Teaching [Redacted] the SQ4R or some similar method for reading texts.
- Assign [Redacted] to a low-distraction work area
- Pause frequently during lecture to give [Redacted] a chance to take notes.
- have [Redacted] repeat and summarize information often
- Write key points on board.
- Give [Redacted] a copy of teacher outline/overheads.
- Give [Redacted] feedback on his or her notes
- Provide direct instruction in note taking
- Break lectures or material into short segments.
- Ask [Redacted] to repeat your instructions often and call on [Redacted] often.
- Provide special activities in school (computers, Internet, hobbies)
- Learning resource center for [Redacted] (regular or special education)
- Case manager assigned to oversee plan outline for [Redacted]

- For heavy reading assignments, [Redacted] might benefit from being allowed to read ahead so as to consolidate information.
- [Redacted] might benefit from a test taking course and or computer program.

Home & Behavioral Issues:

1. [Redacted] needs a very structured and consistent academic and behavioral environment with consistent rules and expectations regarding homework and school work. [Redacted] needs a structured tracking program implemented to run between school and home that is designed to track and reward behaviors necessary for classroom success. These will be targeted by the teachers.
2. Continued family therapy while Mt. Bachelor [sic] and most likely beyond.
3. It is recommended that both [Redacted] and [Redacted] obtain and read *Parents and Adolescents Living Together: Volumes I and 2*, by Miriam Forgatch and Gerald Patterson to better understand the skills necessary for smooth adolescent development.
4. I would recommend that both [Redacted] and [Redacted] obtain and read *Taking Charge of Attention Deficit Hyperactivity Disorder* by Russell Barkley, Ph.D. to better understand [Redacted] problems in inattentiveness.
5. I would recommend that both [Redacted] and [Redacted] obtain and read *Attention Deficit Disorder and Learning Disabilities* by Barbara Ingersoll, Ph.D. and Sam Goldstein, Ph.D. to better understand how to evaluate treatments

for Attention Deficit Disorder.

6. I would recommend that both [Redacted] and [Redacted] obtain and read *Daredevils and Daydreamers: New Perspectives on Attention Deficit Hyperactivity Disorder* by Barbara Ingersoll, Ph.D. to gain a broader understanding of the disorder and it's concomitants.

☐ This report should not be viewed or read by [Redacted] as it might cause considerable psychological distress and damage to his self image. It should be stored in a safe place where [Redacted] or other inappropriate readers do not have access to the content.

/s/ Michael J. Fulop, Psy D.
Michael J. Fulop, Psy D.
Clinical Psychology
Oregon Psychologist License #1049

Test Results for [Redacted] for 1/31-2003 2/15/2003

Wechsler Adult Intelligence Scale – 3rd Edition
Standard Score*/Percentile

Index Scores:	
Verbal IQ:	096, 39th %ile
Performance IQ:	110, 75th %ile
Full Scale IQ:	102, 55th %ile

Factor Scores:	
[I, S, V, C] Verbal Comprehension	101, 53rd %ile
[PC-PA-BD-OA] Perceptual Organization	101, 53rd %ile
[A, DS] Freedom from Distractibility, Working	078, 07th %ile
[Cod, PS] Processing Speed, Memory	103, 58th %ile

Verbal Tests	Scaled Score**
Vocabulary	11
Similarities	10
Arithmetic	05
Digit Span	08
Information	10
Comprehension	13
Letter-Number Seq.	06

Performance Tests	Scaled Score**
Picture Completion	09
Digit Symbol - Coding	12
Block Design	10
Matrix Reasoning	12
Picture Arrangement	15
Symbol Search	09

Digit Span Forward:	6
Digit Span Backward:	4

Wide Range Assessment of Memory and Learning
Screening Memory Index 093, 32nd %ile

Subtest Scores:	Scaled Scores
Picture Memory	10
Design Memory	08
Verbal Memory	10
Story Memory	08

Rey Osterreith Complex Figure Test

XX	Raw	Mean	Standard Score	Percentile
Copy	35	35.36	098	45th %ile
3' Recall	26	25.13	103	58th %ile

Trail Making Test Part A & B

Part	Raw (seconds)	Percentile
A (0 errors)	33	25-10th %ile
B (0 errors)	77	< 10th %ile

* Index and Standard Scores have a mean of 100, and a standard deviation of 15.

** Scaled Scores have a mean of 10, and a standard deviation of 3.

Wisconsin Card Sorting Test

Item	Raw Score	Standard Score	Percentile Score
Trials Administered			XX
Total Errors		106	
Total Correct			XX
Perseverative Responses		104	%ile
Perseverative Errors		105	%ile
Non-Perseverative Errors		105	%ile
% Conceptual Level Responses		106	%ile
Number of Categories Completed	6		WNL
Trials to Complete 1st Category	11		WNL
Failure to Maintain Set	2		11-16th %ile
Learning to Learn	-1.04		WNL

Connors Continuous Performance Test

Discriminant Function Analysis:

Clinical Indicators = 50.6%

Non-Clinical = 49.4 %

50.6 Chances out of 100, that there are not clinically significant attention problem on this measure.

Controlled Oral Word Association Test

Letter	Raw Score	Std. Score	Percentile
F	15	104	61st %ile
A	10	090	25th %ile
S	8	074	4th %ile
Total	33	080	9th %ile

Peabody Picture Vocabulary Test

Raw	Std. Score	Percentile	Age Equivalent
152	105	63	9.1

Woodcock-Johnson III Tests of Achievement

CLUSTER/Test	SS	PR
BROAD READING	092	31st
BASIC READING SKILLS	102	56th
READING COMPREHENSION	105	64th
MATH CALC SKILLS	079	08th
ACADEMIC SKILLS	095	38th
ACADEMIC FLUENCY	085	16th
ACADEMIC KNOWLEDGE	104	61st
Letter Word ID	103	58th
Reading Fluency	087	19th
Passage Comprehension	103	57th
Reading Vocabulary	106	66th
Word Attack	102	55th
Spelling	101	52nd
Calculation	084	14th
Math Fluency	074	04th
Academic Knowledge	104	61st

Appendix B
Attention Deficit/Hyperactivity Disorder
Schoolwork Intervention
Executive Function

Because students with Attention Deficit/ Hyperactivity Disorder have weak executive function, they do not perform executive and planning functions internally as well as other students. Most good students monitor their own time, and spend time internally planning their workload, without prompting from parents and teachers. They do this planning because they understand the consequences of not getting their work done on time (i.e., they are self-motivated). Children with attention problems don't spend much time during the day thinking about how to get their work done. They lack both the internal executive skills, and the ability to be self-motivated. These tasks must therefore be programmed externally, when children are young, so that they can learn ways to internalize these functions as they get older.

Providing this support externally relies on two main strategies:

Frequent external checks on schoolwork, to supply the monitoring and planning, and

Rewards and consequences provided in the context of supportive relationships, to supply motivation.

A supportive team is crucial, including the child, his or her parents, key (or all) teachers, tutor, adviser, learning specialist, psychologist and physician. This team will meet as a whole at least twice a year, to review the student's progress in all subjects, to identify areas of progress and problems,

and to set goats for the upcoming period. Various members of the team will meet more frequently, to monitor ongoing work: A possible schedule:

Meeting for the student, teachers, and parents at the beginning of the academic year to review goals, likely problems, strategies and expectations. Measurable goals should be established, with some way of monitoring whether they have been met.

Regular, brief meetings (at least once a month) between the student, parents and each individual teacher, or with an adviser who has information from all teachers, to review goals, progress, and any need to change strategies.

Regular, brief meetings with the teacher in any class where there is a particular problem.

Regular homework updates, either via very brief meetings on the way out of school Friday afternoon, or through weekly e-mails from teachers to parents are recommended.

Catherine Freer Wilderness Therapy Expeditions
Psycho-Social Assessment
[Redacted]
[Redacted]

IDENTIFYING INFORMATION Trek Date 3/2/2003

Last Name	[Redacted]
First Name	[Redacted]
Middle Name	[Redacted]
Age	[Redacted]
Date of Birth	[Redacted]
Gender	male
Ethnicity	Caucasian
Language	English
Address	[Redacted]
City	Forest Grove
State	OR
ZIP Code	[Redacted]
Hm Phone	[Redacted]

Custodial Involvement	Relationship
[Redacted]	Father-biological
[Redacted]	Mother-biological

Siblings in same home

[Redacted]

At the time of treatment [Redacted] was a [Redacted] year old Caucasian male living in Forest Grove, OR. [Redacted] was admitted to Catherine Freer Therapy Expeditions residential treatment program on 3/2/2003, and is expected to be discharged on 3/22/2003 unless further treatment is required.

Referral Information

Fulop, Michael	(503) 297-3334	13	Does Consent Want Assessment? No
Psy.D.			Field Notes? No
☑ RELEASE FOR THIS CLIENT			Discharge Summary? Yes
[illegible]	(503) 797-[illegible]		Does Consent Want Assessment? No
Therapist			Field Notes? Yes
☑ RELEASE FOR THIS CLIENT			Discharge Summary? Yes
Wachtel, Scott	(503) 816-9129		Does Consent Want Assessment? No
D/A Counselor	First Step Counseling		Field Notes? No
☑ RELEASE FOR THIS CLIENT			Discharge Summary? Yes
Booth, Marilyn	(503) 357-7194		Does Consent Want Assessment? No
doctor			Field Notes? No
☑ RELEASE FOR THIS CLIENT			Discharge Summary? Yes

Main Issue/Precipitating Event

[Redacted] his being admitted into CFWTE due to substance abuse and oppositional behavior.

Father reports that [Redacted] is rebellious, out-of-control, and impulsive. He has low self-esteem and is doing poorly in school. Parents report that [Redacted] has been using marijuana for the past year and has come home high, smoked marijuana in the home, and has left paraphernalia in the house.

[Redacted] had a recent marijuana binge and then ran away for a couple of days. This event prompted his enrollment into Catherine Freer.

Mental Status: (See file for notes taken during initial family meeting which include mental status evaluation.)

ASAM Dimension #1: Drug and Alcohol Use, Detox, Withdrawal

Primary Drug Use

Clients primary drug of abuse is marijuana. Clients secondary drug of choice is alcohol. Client's first use of drugs began at age 16 using marijuana and alcohol. Client's last use of marijuana was 10 days ago. At this time, clients typical pattern of drug and

alcohol use is as follows. He has been smoking marijuana daily. Consequences client has experienced as a result of drug and alcohol use include the following: family conflict, decline in academics, and dysfunction in daily life.

Other Details:
Other drugs that client has used include: NONE.
There does not appear to be any IV drug use.

Diagnostic Criteria:
DSM 4 diagnostic criteria applicable to client includes - increasing amounts used or for a longer period than intended, significant activities in client's life have been given up for drug use and drug use has continued inspite of consequences.

Parent and family A+D use/inheritance factors?
The parents drink beer infrequently. Father reported that [Redacted] maternal great grandmother struggled with alcoholism, and has 8 maternal aunts and uncles who have had substance abuse issues with drugs and alcohol some of which are clean and other who continue to use: [Redacted] has three paternal uncles who are in recovery and one paternal aunt that is currently still using alcohol. There is a significant family history of substance abuse.

Client does not appear to be at risk of withdrawal.

ASAM Dimension 1 Level = I

ASAM Dimension #2: Physical Health
Details, if any:

Broken Bones, Muscular or Ligament Damage?	No	
Motor/Sensorimotor development	No	
Speech, Hearing, Language?	No	
Pregnancy?	No	
Asthma?	No	
Allergies?	Yes	[Redacted] has mild allergy to nuts
Dental Problems?	No	
Vision Problems?	No	
Size or Weight Problems?	No	[Redacted]
Immunizations	Yes	
Current Medications	Yes	Zoloft (150mg)
Other medical concerns	No	
Chronic Conditions	No	
Health Concerns complicated by A+D use?	No	
Any concerns about wilderness tx	No	Client appears of appropriate physical and medical health condition to be able to participate in wilderness therapy program.

ASAM 2 Level = I

ASAM Dimension #3: Affective, Cognitive, Behavioral Health

Client

Client is currently receiving mental health services.

Client has had a prior diagnosis of depression.

In 1993 [Redacted] was involved in individual and family counseling at the Children's Program to address oppositional behavior and anger outbursts. Father reported that this treatment did help [Redacted] in controlling his anger. 4/00 to present [Redacted] has been seeing Dr. Susan Patchin for individual and family sessions to address depression. [Redacted] has recently begun seeing Dr. Michael Fulop for psychiatric testing to address possible dual diagnosis of ADHD/learning disability.

Client has experienced suicidality. On occasion, when angry, [Redacted] will state "I'll just go kill myself", but has never stated a plan and when questioned directly states that he does not want to die.

Family History of Mental Health Problems

Father reported that he was treated for depression between 1999-02 and [Redacted] sister was treated for depression and cutting when she was 16. [Redacted] maternal aunt and three uncles continue to suffer from depression. [Redacted] has two maternal cousins with mental health issues, one who suffers from Obsessive Compulsive Disorder and Dyslexia and the other that has been diagnosed with Schizophrenia.

[Redacted] his parents and psychologist report moderate to severe depressive symptoms (low motivation, poor self image, depressed mood,

irritability) dating back at least several years. He was diagnosed with depression in 2000. Despite extensive outpatient and psychotropic treatment, these symptoms have caused academic impairment, poor social and family relations and have likely contributed significantly to his drug use.

ASAM 3, Level = III

ASAM Dimension #4: Treatment Acceptance/Resistance

Client does know that they are coming to treatment, but it is unclear if they are likely to be compliant with treatment expectations.

Client does have a history of running away. [Redacted] ran away for two days in February.

There are no external pressures or mandates for client to participate in treatment.

Client is somewhat aware and concerned that there may be a problem to address but is reluctant to do so.

Client tends to blame others for problems.

ASAM 4 Level = II

ASAM Dimension #5: Abstinence/Relapse Potential

Client does not have any significant history or pattern of abstinence then relapse. Client has not had exposure to or knowledge of relapse prevention skills. Current peer group, hereditary traits, continued depression, and lack of relapse prevention skills could be possible relapse influences. Without effective intervention client's drug/alcohol use and negative behaviors are likely to escalate significantly.

Client appears to have little significant awareness of triggers and relapse warning signs for drug/alcohol use and negative behavior/emotional patterns.

Client has not had previous treatment for drug and/or alcohol problems.

Father reports that [Redacted] is extremely creative and sensitive. He has a great sense of humor and has progressed in learning how to play the guitar and piano. These qualities could be positive influences during recovery.

Client does not have a reported history of relapse.

ASAM 5 Level = II

ASAM Dimension #6: Recovery Environment

Education/Employment

Client is currently in the 11th grade in school and generally getting below average grades. School performance has been deteriorating.

Father reports that [Redacted] does not turn in assignments, has two incompletes, and his GPA is below 2.0. It is reported that [Redacted] has always struggled with academics and has trouble organizing, staying task oriented, and tends to procrastinate.

[Redacted] was employed at a nursery after school for a short period of time. He was fired after not showing up for work. Client is not currently employed fulltime, and addiction or mental health issues have not significantly affected occupational pursuits. Refer to parent packet information, page 6 for information regarding employment

Social Environment

Most of clients friends in the recovery environment tend to be negative influences, either in terms of alcohol/drug use, illegal activities or lack positive involvement in school, sports or or activities.

Father reports that [Redacted] very rarely has friends over visits friends [sic]. [Redacted] does associate with others who use substances.

Client is not involved in a relationship at this time. Client is not sexually active.

Religious/Cultural Factors Affecting Treatment and Other Support System

There does not appear to be any religious or spiritual factors that would impact treatment. For information regarding religious/spiritual life of client and family, and ways it could impact treatment, refer to parent packet information, page 7. Client has been raised in a middle-class to upper-middle class background. There does not appear to be any cultural factors that would impact treatment. Refer to parent packet information, page 7 for more information. Parents report that [Redacted] has many family members and some friends that serve as positive supports. For information regarding support systems, refer to parent packet information, page 6.

Family Background

[Redacted] lives with his biological parents. His older sister lives outside of the home.

[Redacted] biological parents have been married for 28 years. Father reports their relationship as stable and nurturing. For information regarding parental marital history and family functioning refer to parent packet information, page 5.

Parents report that [Redacted] is currently defiant towards them and frequently has mood swings. Parents report that [Redacted] gets along well with his older sister.

Parenting/family life

Family life appears to be calm and stable. Parents are actively supportive of treatment. Some family members have attended therapy/support groups. [Redacted] has been unable to maintain sobriety and manage oppositional behavior in his home environment. He interacts with using peers, which pose a risk for continued use. His substance use and oppositional behavior are negatively affecting his school performance and family relationships.

Client's family provides clear expectations regarding house rules, school performance, etc. and generally follows through with appropriate consequences when expectations aren't met.

A+D and Mental Health History of family

The parents drink beer infrequently. Father reported that [Redacted] maternal great grandmother struggled with alcoholism, and has 8 maternal aunts and uncles who have had substance abuse issues with drugs and alcohol some of which are clean and other who continue to use. [Redacted] has three paternal uncles who are in recovery and one paternal aunt that is currently still using alcohol. There is a significant family history of substance abuse. [Redacted] has many family members who are currently abusing substances.

[Redacted] has been unable to maintain sobriety and manage oppositional behavior in his home environment. He interacts with using peers, which pose a risk for continued use. His substance use and

oppositional behavior are negatively affecting his school performance and family relationships.

ASAM 6 Level = III

Signature Date
Natala Larson, B.S.

/s/ Rob Conley
Rob Conely
Clinical Director

Parents Rights Special Education
(K-18)

Notice of Procedural Safeguards
September 2002

Oregon Department of Education
Office of Special Education
255 Capitol Street NE
Salem, Oregon 97310
503-378-3600 ext. 4413
Fax 503-378-5156
TDD 503-378-3600 ext. 2892

It is the policy of the State Board of Education and a priority of the Oregon Department of Education that there will be no discrimination or harassment on the grounds of race, color, sex, marital status, religion, national origin, age or disability in any educational programs, activities or employment. Persons having questions about equal opportunity and nondiscrimination should contact the State Superintendent of Public Instruction at the Oregon Department of Education.

This handbook was produced
by the Office of Special Education.

This document is available on the web at www.ode.state.or.us and may be reproduced without permission for educational purposes. Additional copies may be obtained at no charge by calling the Oregon Department of Education at (503) 378-3600, ext. 4413

Copies of this document in Braille, Large Print, Spanish, Russian, Chinese, and Vietnamese are also available

Procedural safeguard documents can be requested for parents of children birth through age five and for students ages 18 through 21 years of age.

TABLE OF CONTENTS

Introduction 1
For More Information 2
Parent Participation 3
Surrogate Parents 3
Parent Consent 3
Prior Written Notice 5
Reevaluation 7
Access to Educational Records 7
Independent Educational Evaluations 8
Resolving Disagreements 9
School Discipline and Placement in Interim Alternative Setting 15
Children Attending Private Schools 20
Transfer of Rights at Age of Majority 23
Other Resources 25

Children With Disabilities Under Section 504

Some children may have a disability that affects a major life activity by does not fit into one of the categories of disability under the Individuals with Disabilities Educational Act. (IDEA). These children may be protected by a different federal law—Section 504 of the Rehabilitation Act of 1973. The rights of "504 only" children and their parents are in some ways similar and in some ways different from the procedural safe guards described in this booklet. For more information about Section 504, contact your school district's 504 coordinator.

Dear Parents:

This notice describes your rights and procedural safeguards under Oregon law and rules and under the federal Individuals with Disabilities Educational Act and its regulations. This information is important to you and your child. Please review and study the information contained in this booklet.

You may want to talk with other about this information. I encourage you to speak your child's teacher or teachers, the building principal, or a special education representative in your district. We have given you some other resources in Oregon who you may also contact, many of which are listed on the final page of this pamphlet.

When you have a concern, please call or contact your child's teachers or administrators in your child's district to talk about your child and any problems you see. This informal conversation frequently solves the problem and helps maintain open communication.

All of us are working together for your child's benefit. Your child is important to us.

Sincerely,

Steve Johnson
Associate Superintendent
Office of Special Education

INTRODUCTION

This booklet provides parents of children with disabilities from kindergarten through age 18 an overview of their educational rights, also called procedural safeguards. This booklet is the *Notice of Procedural Safeguards* for parents and surrogate parents.

These procedural safeguards apply to all public agencies that provide special education services as required by the Individuals with Disabilities Educational Act (IDEA) to school age students in Oregon.

This *Notice of Procedural Safeguards* must be given to your when you ask for a copy and:

- the first time your child is referred for a special education evaluation;
- Each time an individualized education program (IEP) meeting is scheduled for your child;
- each time your child is reevaluated;
- a year before your child's 18th birthday;
- if you request a due process hearing, and
- if the school district takes disciplinary action that is a change in placement for your child.

The IDEA is a federal special education law that requires school districts to provide a free appropriate public education (FAPE) to eligible children with disabilities. A FAPE means special education and related services, necessary for your child to benefit from his or her education. Services will be provided to your child as described in your child's Individualized Education Program (IEP) and in the least restrictive environment.

FOR MORE INFORMATION

Your local school district is the first stop for more information. There are a number of people in the school district who can answer questions about your child's education. You may contact your child's general or special education teacher or the school principal. You can contact the special education representative for your school district or education service district (ESD). Other resources are listed at the end of this booklet.

PARENT PARTICIPATION

Your participation is valuable. You will be given opportunities to participate in meetings about identification, evaluation, educational placement of your child and other matters relating to your child's free appropriate public education (FAPE). This includes the opportunity to participate in meetings to develop your child's IEP. Your child's IEP describes what special education services will be provided to your child and identifies educational goals for your child. More information about IEPs is available from your school district.

SURROGATE PARENTS

The school district mist assign a person to act as a surrogate parent for a child when (1) no parent can be identified; (2) after reasonable efforts, the parent cannot be located; or (3) the child is a ward of the court. Each school district has a method for determining whether a child needs a surrogate parent and for assigning a surrogate parent to the child.

The person selected as surrogate (1) may not have any interest that conflicts with the interest of the student he or she represents and (2) must have

knowledge and skills that ensure adequate representation of the student. A surrogate parent participates as a the parent at IEP meetings and has all the rights discussed in this booklet.

PARENT CONSENT

Consent means that you, the parent, have been given and understand all the information relevant to the activity for which consent is requested and you voluntarily agree. This information must be provided in your native language or other mode of communication. You must agree in writing when your consent is needed. The consent also describes the activity and lists records, if any, that will be released and to whom those records will be released.

The First Evaluation. The school district must have your informed written consent before it can evaluate your child. The school district must inform you about the evaluations to be used with your child.

Reevaluation. The school district must have your informed written consent before reevaluating your child. However, the school district may reevaluate your child without your written consent if the school district has taken reasonable measures to get your consent and you have not responded. State regulations require parent consent before giving an intelligence or personality test. If you refuse consent you must clearly inform appropriate school staff of your refusal.

Initial Placement in Special Education. You must give your informed written consent before the school district can place your child in a special education program for the first time.

Exceptions to Parent Consent. Parental consent is not required before (1) reviewing existing information as part of an evaluation or reevaluation; (2) giving a test or evaluation that is administered to all children unless consent is required of all children's parents before administering the test or (3) conducting evaluation tests, procedures or instruments that are identified on the child's IEP as a measure for determining progress.

Refusal. You can refuse consent for an evaluation, a reevaluation, or the initial placement of your child in special education. To avoid confusion, you should inform the school in writing if you want to refuse consent. If you refuse consent, the school district may seek to evaluate your child through a due process hearing, if it believes that evaluation is necessary for your child to get a FAPE. You and the school district may agree to first try mediation to resolve your disagreements.

Parent consent is not required if a hearing officer determines that the evaluation or reevaluation is necessary to ensure that the child is provided with a free appropriate public education.

Withdrawl of Consent. After you have given the school district written consent to evaluate or reevaluate your child, you may revoke your consent only for the evaluation activities that are not yet completed; it is not retroactive. You may withdraw your consent the first time your child is placed in special education only before your child begins that placement.

PRIOR WRITTEN NOTICE

In addition to being a participant in decision-making, you have the right to have the school district notify

you in writing about important decisions that affect your child's special education but a reasonable time before those decisions are put into place.

These include decision to:

- indentify your child as a child with a disability, or change your child's eligibility to another;
- evaluate or reevaluate your child;
- provide a free appropriate public education to your child, or change a component of your child's free appropriate education; or
- place your child in a special education program or
- change your child's special education placement.

You also have the right to prior written notice from the school district if the district refuses your request to take these actions. Prior written notice must include:

- what action the district is proposing or refusing to take;
- why the district is proposing or refusing the action;
- a description of any other options considered and the reasons why those options were rejected;
- a description of each evaluation procedure, test, record, or report used as a basis for the action proposed or refused;
- a description of any other factors relevant to the action proposed or refused;
- a statement that parents of a child with a disability are protected by the procedural safeguards described in this booklet;

- a copy of this *Notice of Procedural Safeguards* booklet or information or how you can get a copy; and
- sources for you to contact to get help in understanding these procedural safeguards.

Prior written notice must be provided in your native language unless it is clearly not feasible to do so. The notice must be written in language understandable to the general public.

If your native language or other mode of communication is not a written language, the school district must take steps to ensure that:

- the notice is translated orally or by other means in your native language or other mode of communication;
- you understand the content of the notice; and
- there is written evidence that these requirements have been met.

REEVALUATION

Your child must be reevaluated at least once every three years. If the IEP team decides that no additional information is needed to determine whether your child continues to be eligible for special education, the school district must notify you of that decision and the reasons for it. You still have the right to request an evaluation to determine whether your child continues to be eligible, but the school district is not required to do an evaluation of your child unless you request it.

ACCESS TO EDUCATIONAL RECORDS

You have the right to inspect and review all of your child's education records:

- without unnecessary delay;

- before any meeting about your child's IEP;
- before any due process hearing related to your child; and in any case,
- within 45 days of your request.

Requests to look at your child's records should typically be made to the building principal or to the special education administrator for your school district.

Access to your child's educational records is required by both the Family Educational Rights and Privacy Act (FERPA) and the IDEA. Your school district has a more detailed written policy about school records. This policy is available to parents on request.

INDEPENDENT EDUCATIONAL EVALUATIONS

You have the right to an independent educational evaluation at public expense if you disagree with the evaluation that the district has provided for your child. An independent educational evaluation is an evaluation by a qualified examiner who is not an employee of the school district responsible for your child. Public expense means that the school district must arrange for the evaluation to be provided at no cost to you. If you request an independent evaluation, it is important to clearly inform the district about your request. The school district may ask why you disagree with the evaluation they have provided for your child. You may, but are not required, to provide an explanation. The school district must inform you about where an independent educational evaluation may be obtained, and advise you of the school district's criteria for independent educational evaluations. You are not required to use an evaluator from the school district's list.

If you request an independent evaluation, or reimbursement for an independent evaluation, the school district must respond to your request without delay. The school district must wither request a due process hearing to show that its evaluation is appropriate for your child, or ensure access to an independent evaluation is provided at no cost to you. If the school district initiates a due process hearing and the final decision is that the school district's evaluation is appropriate, you may obtain an independent educational evaluation at your own expense.

If you obtain an independent educational evaluation, the results of the evaluation must be considered by the school district in any decision related to your child's free appropriate public education. The results of the evaluation may be presented as evidence at a due process hearing.

If a due process hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

RESOLVING DISAGREEMENTS

If you have concerns about your child's special education services, the first step is to talk to your child's regular or special education teacher, the building principal, or the school district's special education representative. It helps to deal with concerns when they first arise so steps can be taken as soon as possible to support the working relationship among parents, staff, and children. If the concerns are not resolved, you can take further steps to address them, including mediation, a written complaint to the Oregon Department of Education (ODE), and /or requesting a due process hearing.

Mediation. You may ask the school district to try mediation. A mediator is a neutral person who is trained in strategies to assist parents and school districts to resolves disagreements over difficult issues. Mediation is voluntary, confidential, and informal. Both parents and school staff must agree to try mediation before a mediator will be appointed.

If you are reluctant to try mediation, ODE may offer you an opportunity to meet with or talk to a neutral person who can explain the benefits of the mediation process. If you have requested a due process hearing, the Oregon Department of Education (ODE) will pay the costs of mediation. Otherwise the costs of mediation will be paid by the school district. For more information about mediation, you may obtain a copy of the ODE Office of Special Education's mediation brochure and handout by calling (503) 378-3600, ext. 2334. The mediation brochure is also available at http://www.ode.state.or.us/sped/spedlegal/mediation.htm.

Written Complaint. If you believe the school district has violated the IDEA, you may file a written complaint with ODE. A complaint investigation is an informal, objective review of your concerns by ODE. Complaints must be related to a violation within the 12 months before you file your complaint with ODE. ODE staff may review information for up to three years before the time that you filed your complaint if the problem is continuous or if you are requesting compensatory services. Compensatory services are educational services that should have been provided but were not.

The written complaint must describe the violation, include your name and contact information, and give

specific facts about the violation. Written complaints are sent to:

State Superintendent of Public Instruction
Oregon Department of Education
255 Capitol Street NE
Salem, OR 97310

If you file a written complaint of this type, the ODE must investigate and send a written order within 60 days. This timeline may be extended if there are exceptional circumstances related to the complaint. The final order does not identify you or your child by name. The final order is a public record.

A complaint investigation order is considered an uncontested case under state law. If you are dissatisfied with the results, you may appeal within 60 days to the Marion County Circuit Court or the Circuit Court for the county where you live. The complaint order does not prevent parents from requesting a due process hearing on the same violations.

A court may award reasonable attorney fees under the complaint resolution process if the parent is considered a prevailing party in the complaint. Other restrictions on attorneys fees may apply. More information about the complaint investigation process is available from ODE's Office of Special Education by calling (503) 378-3600, ext. 2333. Information on the complaint investigation process is available at http://www.ode.state.or.us/sped/spedlegal/complaints.htm

Due Process Hearing. You may request a due process hearing if you disagree with the identification, evaluation, educational placement, or other aspects relating to your child's free appropriate public

education. A due process hearing is a formal legal proceeding. Like written complaints, hearing requests are made to the State Superintendent of Public Instruction.

Your hearing request must include:

- your child's name and address and the name of the school that your child is attending;
- a description of the disagreement, including specific facts; and
- any suggestions you have for resolving the disagreement

A model form for requesting a due process hearing is available from ODE's Office of Special Education by calling (503) 376-3600, ext. 2334 Information on due process hearings is located at http://www.ode.state.or.us/sped/spedlegal/dueprocess.htm. It is important on raise and resolve your concerns when they occur. Oregon has a two year statute of limitations for filing a due process hearing.

A school district also may request a due process hearing when a parent refuses consent for evaluation or to demonstrate that the school district has conducted an appropriate evaluation and/or offered a free appropriate public education. When you request a hearing the ODE staff will provide you with a copy of this *Notice of Procedural Safeguards,* inform you that mediation is available at no cost, and advise you of any free or low-cost legal services. An impartial hearing officer will be appointed to conduct the hearing.

A hearing must be completed and final order issued within 45 days of ODE's receipt of a hearing request unless the hearing officer grants an extension of time at the request of a party.

Your due process hearing rights include:

- the right to bring an attorney who can give you advice;
- the right to bring one or more individuals who have special knowledge or training about children with disabilities;
- the right to have your child remain in his or her current educational placement during the process of hearing and appeal unless:
  - you and the school district agree to another placement;
  - your child is applying for initial admission to a public school and you consent to your child's placement in a public school program;
  - your child is removed by the school district to an interim placement for up to 45 days for a weapon or drug violation; or
  - your child is removed by a due process hearing officer to an interim placement for up to 45 days due to the substantial likelihood of injurious behavior;
- the right to present written and verbal evidence, and to confront, cross-examine, and require witnesses to be present;
- the right to be informed at least five five business days before the hearing of the evaluations completed by the district hearing by that date and recommendations based on those evaluations that they intend to use at the hearing;
- the right to have your child present at the hearing;

- the right to have the hearing closed or open to the public;
- the right to prohibit the introduction of any evidence at the hearing that has not been disclosed to you at least five business days before the hearing. The hearing officer may prohibit the introduction of any evidence not disclosed five business days before the hearing without the consent of the other party;
- the right to obtain a written or, at your option, an electronic verbatim record of the hearing at no cost; and
- the right to obtain a written or, at your option, an electronic copy of the hearing decision at no cost.

The final order will be given to the State Advisory Council for Special Education. The order does not identify you or your child by name. It is a public record.

Civil Actions. A decision by a hearing officer is final except that a losing party can bring a civil action in court within 120 days of the final order. If you file a civil action in federal or state court, the court must:

- receive the record of the hearing;
- hear additional evidence at the request of a party;
- base its decision on the preponderance of the evidence; and
- grant such relief as the court determines is appropriate.

Attorney fees. A court may award reasonable attorney fees to you if you prevail in the action. Attorney fees may be denied for:

- attorney services after you have received a written offer of a settlement that is as favorable as the relief finally obtained;
- attorney attendance at an IEP team meeting unless the meeting is ordered by a due process hearing officer or court; or
- attorney attendance at a mediation that is conducted before a request for a due process hearing.

Attorney fees may be reduced if:

- you unreasonably delay the final resolution;
- the amount of the attorney fees unreasonably exceeds the community rate for similar services, skills and experience;
- the time spent and legal services provided are considered excessive; or
- the written request for a hearing did not include all of the required information.

SCHOOL DISCIPLINE AND PLACEMENT IN INTERIM ALTERNATIVE EDUCATIONAL SETTING

Disciplinary Removals. School districts may suspend a student with a disability from his/her current educational placement for disciplinary reasons for up to ten school days in a row. Districts may use short-term removals, including suspension, moving your child to an appropriate interim alternative educational setting, or putting your child in another setting, to the same extent these options would be with students without disabilities.

Districts may suspend students from their current educational placement for additional periods of up to ten school days in a row in the same school year for separate incidents if the removals are not a change in

educational placement. The school district must provide services that are necessary for your child to appropriately progress in his/her education during these removals. School personnel are responsible for deciding the services that will be provided.

Change in placement. School districts must follow the special education procedures for disciplinary removals that are a change in educational placement. A change in educational placement includes:

- suspension and expulsions of more than ten school days in a row, and
- a series of short- term removals that add up to more than ten school days if there is a "pattern" to the removals. A pattern depends on the length of each removal, the total amount of time removed, and how close in time the removals are to one another. School personnel will decide whether a series of removals is a "pattern" based on the specific circumstance of the case.

Parent Notice. Any time a school removes your child for drugs, weapons, dangerous behavior, or for other removals that constitute a change of placement because of violation of the code of conduct that applies to all children, the school district must notify you not later than the date on which the decision to take the action is made and provide you with a copy of procedural safeguards.

Manifestation Determination. If school district personnel are considering a disciplinary removal that is a change in educational placement, the district must hold an IEP team meeting to make a manifestation determination. This meeting must take place immediately, if possible, or within ten days of the

school district's to take this type of disciplinary action. School districts may not remove your child for disciplinary reasons for behavior that is a manifestation of his or her disability.

The IEP team determines whether the behavior is a manifestation of your child's disability. You will be invited to participate as a member of this team. The IEP team may determine that the behavior was not a manifestation if the IEP team:

- reviews all relevant information, including:
  - test results, and any independent educational evaluations;
  - information provided by the parents;
  - observations of the child; and
  - the child's IEP and placement;
- and determines that, in light of the behavior:
  - your child's IEP and placement were appropriate in relation to the behavior being disciplined;
  - the special education services, supplementary aids and services, and behavior intervention strategist were implemented as described on your child's IEP;
  - your child's disability did not impair the ability to understand the impact and consequences of the behavior, and
  - your child's disability did not impair the ability to control the behavior.

If the IEP team concludes that the behavior was a manifestation of your child's disability:

- the school district, may not expel the student or suspend the student for more than ten school days in a row, or for more than ten

school days in the school year if the removals are a "pattern";
- the school district or parent may hold an IEP meeting to review the information; and
- the IEP team may make changes in the child's IEPs services and/ or placement.

If the IEP team finds deficiencies in the IEP placement or in the implementation of the services, the district must take immediate action to remedy the deficiencies.

If the IEP team concludes that the behavior was not a manifestation of your child's disability:

- the school district may take disciplinary action, such as expulsion, in the same manner as it would for children without disabilities;
- the school district must make sure that the special education and disciplinary records of your child are provided to the expulsion hearing officer if an expulsion hearing is required;
- the school district must continue to provide a free appropriate public education to your child consistent with the child's individual needs and Oregon's alternative education requirements; and
- the school district must provide you with notice of the change and a copy of this *Notice of Procedural Safeguards*. If you disagree with the IEP team's decision, you can request an expedited due process hearing.

Functional Behavioral Assessments and Behavior Plans. Behavior is one of the factors IEP teams are required to consider when developing or reviewing your child's IEP. If the school did not already

conduct a functional behavioral assessment and implement a behavior plan for your child before the misconduct occurred, the IEP team must meet to develop an assessment plan. This meeting must be held no later than ten business days after either first removing your child for ten school days or not later than ten business days after beginning a removal that is considered a change of placement. As soon as practicable after developing an assessment plan and completing the assessments, the IEP team must meet to develop appropriate behavior interventions and implement those interventions.

Removals for Weapons or Drugs. School personnel may move a child to an interim alternative educational setting for up to 45 days if:

- the child carries a weapon to school or to a school function or possesses a weapon at school; or
- the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function.

The specific interim alternative educational setting must be determined by the IEP team and meet the requirements below.

Removal by a Hearing Officer. A hearing officer may move a child to an interim alternative educational setting for up to 45 days at a time if:

- the child would be substantially likely to cause injury to the child or others in the current placement;
- the school district has made reasonable efforts to minimize the risk of harm in the current placement; and

- the interim alternative educational setting meets the requirements below.

This process may be repeated.

Interim Alternative Educational Setting. An interim alternative educational setting must:

- allow your child to continue to participate in the general curriculum, although in a different setting;
- allow your child to continue to receive services and modifications, including those described in your child's IEP, to enable your child to meet IEP goals; and
- include services and modifications designed to address the child's behavior.

CHILDREN ATTENDING PRIVATE SCHOOLS

Limitation on Services. Children who are enrolled by their parents in private schools may participate in publicly funded special education and related services. Federal law allows school districts to limit the amount they spend for these services. If your child is to receive special education services under this provision, the school district will meet with you to develop a service plan describing the services to be provided to your child. Services may be provided on-site at the private school or at a public school. If the services are offered at a public school, the district must offer transportation for the child to access these services.

When Reimbursements is Not Required. School districts are not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if the school district made a free

appropriate public education available to the child and the parents chose instead to place the child in a private school or facility.

When Reimbursement May Be Required. A court or hearing officer may require a school district to reimburse parents for the cost of private school placement made without the consent of or referral by the school district only if:

- the child received special education and related services under the authority of a public agency before enrolling in the private school;
- the court or hearing officer finds that at that time the school district did not make a free appropriate public education available to the child in timely manner; and
- parent provided notice removing the child from public school.

When Reimbursement May Be Reduced or Denied. A court or hearing officer may reduce or deny reimbursement in the following circumstances.

- the court or hearing officer also may reduce or deny reimbursement if the parents did not inform the school district that they were rejecting the placement proposed by the school district and state their concerns and their intent to enroll their child in a private school at public expense. This notice must be given either:
  - at the most recent IEP meeting that the parents attended before removing the child from public school; or
  - in writing to the school district at least ten business days before removing the child from public school.

- A court or hearing officer may not reduce or deny reimbursement if a parent does not give this notice if:
  - the parent is illiterate or cannot write in English;
  - giving notice would likely result in physical or serious emotional harm to the child;
  - the school prevented the parent from giving notice; or
  - the parent had not received a copy of this *Notice of Procedural Safeguards* or otherwise been informed of this notice requirement.
- The court or hearing officer also may reduce or deny reimbursement if the parent does not make the child available for an evaluation by the school district, if:
  - the school district gave prior written notice of its intent to evaluate or reevaluate the child;
  - the purpose of the evaluation as described in the prior written notice was appropriate and reasonable; and
  - the prior written notice was given before the child was removed from the public school.
- Reimbursement may also be reduced or denied upon a judicial finding that parents were unreasonable in their actions or the costs of the private program are unreasonable.

TRANSFER OF RIGHTS AT AGE OF MAJORITY

Under Oregon law, persons reach the "age of majority" and become legal adults when they reach their 18th birthday, marry, or pre legally emancipated. After age 18, a person is no longer under the

legal guardianship of their parent or other adult unless a court has established adult guardianship. Students who have reached the age of majority are responsible for making decisions about their own education. The special education procedural safeguards in this booklet will transfer to the student at the age of majority unless the student has a court-appointed legal guardian. This means that the student will have the right to participate as the decision-maker in eligibility, IEP and placement meetings, to consent or refuse consent for evaluation or reevaluation, and to exercise other special education rights

A student who has reached the age of majority may ask the school district to appoint a surrogate parent for them if they prefer not to exercise these rights and have no court-appointed guardian.

At least one year before your child's 18th birthday, the district will notify you and your child that the procedural safeguards will transfer at the age of majority. Once rights transfer, parents continue to receive notices of meetings and prior written notices of district actions. However, the parent may not attend meetings unless specifically invited by the student or the school district.

If you have concerns about the ability of your child to make decisions or questions about guardianship, you may want to consult with an attorney or other knowledgeable person or resource for additional information. More information about the transfer of rights to students is available from ODE's Office of Special Education on request by calling (503) 378-3600, ext. 4413. A document on the transfer of rights at the age of majority is located at http://www.ode.state.or.us/sped/spedareas/transition/documents.htm

OTHER RESOURCES

The publicly funded organizations listed here may be able to assist you in understanding the procedural safeguards and other provisions of the IDEA.

Your local school district

Coalition in Oregon for Parent Education (COPE)

Salem: (503) 581-8156
Toll Free: (888) 505-2673
Website: www.open.org/orcope

National Information Center for Children and Youth with Disabilities (NICHCY)

Toll Free: (800) 695-0285
Website: www.nichcy.org

Oregon Advocacy Center (QAC)

Portland: (503) 243-2081
Toll Free: (800) 452-1694
Website: www.oradvocacy.org

Oregon Department of Education
Office of Special Education

Salem: (503) 378-3000, ext. 2334
Website: www.ode.state.or.us

The State Advisory Council for Special Education meets several times each school year. Each meeting includes a time for public comment. A brochure about the council and its meeting schedule are available from ODE's Office of Special Education by calling (503) 378-3600. Information about SACSE is available at http://www.ode.state.or.us/sped/adviscou/sacse/index.htm.

MULTIDISCIPLINARY TEAM MEETING NOTES FOR:

STUDENT [redacted] 7th grader

Case Mgr. Velma
obs. Lorraine

Date/ Discussion		Person Responsible	Date Comp
1/16/01	Ref. to Referral Basic test perform in Middle 3 bad grades of C Reading/math Tardies/attendance may become too head or other issues Suggest: ob fu-algebra - F (Lorraine) Maybe ADD/ADHD?		
	Need tutoring/assess level so know done after school help, direction in class, Ann. Camp in CCC after school		
2/6/01	F4 sent, not ret'd new student referral by parent LD evaluation planned psychological Vinnie Martin academic Lorraine Shotmeyer class observation Jerelin Pagels		
2/13/01	F4 not returned yet Lorraine will add medical state due to suspected ADHD		
2/20/01	F4 not in yet		
2/27/01	" " " "		
3/13/01	F4 not in, Parents have not returned calls.		

SER 019

Exhibit A12
Page 1 of 3

96

BEST AVAILABLE COPY

3/30/01 1 - 4 release not sent signed on. 3/19/01.

4/24/01 observation - completed (J Rappolee)

5/1/01 Lorna is almost finished with Acad testing.
Sending dev. hist. inquiry and F11 home on 5/2.
Jtm completed observation.
Psyc pending.

5/8/01 Vinny evaluated him - completed testing and scored
Overall GIA = 92
Verbal ability = 111
Thinking = 97
Cog efficiency = 71

Vinny does not see significant processing deficits.

Lorna reports his math reasoning was not good (no official score yet)

5/22 WIAT complete

		Composite 55
Basic Rdg -	97	
Math Reas	91	Rdg 108
Spelling	84	Math 81
Rdg Comp	125	Wri 93
Num Opn	74	
Written Exp	102	

Lorna still waiting for dev history form and F11 to come back from parents.

? Nothing new to report - finish testing next week SER 020

7/10/01 Still report out to Parent Possible 504
NOT Eligible LD 6/13/01

FOREST GROVE SCHOOL DISTRICT

Name [Redacted] Bd.: [Redacted]

Date: 6/01 CA 15-9

School Forest Grove High School
Couns.: L. Kaufman Grade: 9th

Parents Name: [Redacted] Address [Redacted]

Phone: [Redacted]

Reason for Referral: PSYCHOLOGICAL EVALUATION

TECHNIQUES EMPLOYED

1. Student Interview
2. Woodcock Johnson-III Tests of Cognitive Abilities (WJ-III, Cog.)
3. Wechsler Individual Achievement Test (WIAT)-Admin. by L. Shofner
4. Conferences with Student Study Team (various times); Elig. M[illegible]. (6/13/01)
5. Review of pertinent data - see school folders

BACK GROUND INFORMATION/
REASON FOR REFERRAL

[Redacted] was seen for a psychological evaluation at his parent's request to determine the possible presence of a Learning Disability. [Redacted] has been seeing a community psychologist (Dr. Patchin) for "general adolescent issues," according to his mother. Apparently, [Redacted] can be "strong willed. . . sensitive to others. . . angry at times."

Review of school records indicated variable achievement with primarily Cs and Bs in grade 8. [Redacted]

did not meet benchmark standards in Math, Reading and Literature in grade 8 state testing. Grade 9 grades deteriorated as the year progressed (3 Fs in 1st marking period of the second semester). Conversation with Mr. Wanner (applied pre-algebra teacher in 1st sem.) indicated relatively good test scores with missing assignments pulling down [Redacted] grades.

PSYCHOLOGIST OBSERVATIONS

[Redacted] was seen on one occasion for formal evaluation at which time rapport was easily established as he readily cooperated with the evaluation. [Redacted] exerted good effort, responded well to praise, elaborated upon his original responses with a minimum of encouragement, and did not become discouraged when presented with relatively difficult material. The test results appeared to be valid and reliable.

[Redacted] spoke freely and somewhat spontaneously about his school environment. Comments about his classes indicated he is aware that many of the difficulties he experiences are due to motivational factors. He said, "They're going all right, but I could be doing better. . . (How?) I could turn in all my work. . . I do it, but I don't hand it in. (Why not?) If I understand it, I don't feel like going thru it all again (i.e. doing homework). . . Sometimes, I don't do a couple and don't want to hand it in."

When questioned about the possible presence of "attentional deficits," [Redacted] said, "After a while I don't feel like listening to her (mother) anymore or paying attention, but I don't think that's what it (ADD) really is . . . If its not interesting to me or its [sic] too hard, I just start thinking about something else."

ASSESSMENT RESULTS
Intellectual Functioning

Interpretation of the Woodcock-Johnson Tests of Cognitive Abilities Third Edition (WJ-III)

[Redacted] overall intellectual ability is in the average range.

[Redacted] verbal ability (acquired knowledge and language comprehension) is in the high average range when compared to others at his age level. His thinking ability (intentional cognitive processing) is in the average range. [Redacted] cognitive efficiency (automatic cognitive processing) is in the low range.

[Redacted] cognitive performance may be influenced by his phonemic awareness (average) and working memory capacity (limited).

TABLES OF SCORES: *Woodcock-Johnson III Tests of Cognitive Abilities*

Norms based on age 15-8

CLUSTER/Test	RAW	AE	EASY to DIFF		RPI	PR	SS/90% BAND	z
GIA	-	12-11	10-0	17-4	82/90	29	92 (88-96)	-0.55
VERBAL ABILITY	-	19	16-1	>24	97/90	78	111 (104-119)	0.76
THINKING ABILITY	-	14-1	9-5	>22	88/90	43	97 (92-102)	-0.18
COG EFFICIENCY	-	9-7	8-8	10-9	14/90	3	71 (65-77)	-1.92
PHONEMIC AWARE	-	13-8	8-10	>28	87/90	42	97 (89-104)	-0.21
WORKING MEMORY	-	11-1	9-2	13-6	58/90	35	86 (78-93)	-1.03
Verbal Comprehension	-	19	16-1	>24	97/90	78	111 (104-119)	0.76
Visual-Auditory Learning	13-5	10-2	7-3	>19	82/90	28	91 (83-99)	-0.60
Spatial Relations	72-0	>25	9-10	>25	93/90	60	104 (96-111)	0.25
Sound Blending	20	11-11	8-9	18-1	89/90	31	93 (84-102)	-0.49
Concept Formation	33-5	16-6	13-4	>21	92/90	55	102 (95-109)	0.12
Visual Matching	37-2	9-9	9-1	10-6	.5/90	2	68 (62-74)	-2.13
Numbers Reversed	11	9-3	7-10	11-5	33/90	12	83 (74-91)	-1.16
Incomplete Words	25	18	9-2	>33	92/90	60	104 (92-116)	0.26
Auditory Work Memory	23	13-0	10-10	16-8	79/90	33	98 (88-108)	-0.43
Vis-Aud Learn–Delayed	17	-	-	-	-	-	-	-0.15

Academic Functioning

Interpretation of the
Wechsler Individual Achievement Test
(Admin. by L. Shofner - 5/1/01)

Subtests	SS	%ile	Composites	SS	%ile
Basic Reading	97	42	Reading	108	76
Math Reasoning	91	27	Mathematics	81	10
Spelling	89	23	Writing	93	32
Reading Comprehension	125	95			
Numerical Operations	74	4			
Written Expression	102	55			

Social/Emotional Functioning

The purpose of this evaluation was not to provide an in depth personality assessment. However it appeared evident that motivational factors play a significant role in [Redacted] functioning. He appears to understand behavioral and academic expectation and make clear choice to either comply or not comply with those expectations. The reasons why are beyond the scope of this evaluation.

SUMMARY

[Redacted] 9th grader who has been experiencing some academic adjustmental difficulties as a result of a combination of factors to include intellectual (average), academic (skills generally compatible with his measured abilities), and social/emotional (i.e. need to improve self-motivation) components affecting his functioning.

CONCLUSIONS AND/OR RECOMMENDATIONS

N.B. All eligibility determinations are made only by the eligibility team in appropriately conducted eligibility and/or IEP team meetings.

1. [Redacted] was determined "not eligible" as Learning Disabled at an eligibility meeting (6/13),

which included Mrs. [Redacted]. Considerations discussed at the meeting included possible tutoring in math over the summer, credit recovery or tutorial in the Fall, reconsideration of eligibility pending [Redacted] progress in the Fall

2. Suggestions pertaining to the improvement of "Questioning rules that may be unfair" are attached and may be modified, as deemed appropriate.

3. A copy of this report will be sent to [Redacted] parents and additional consultation may be made, upon request.

/s/ Vinny Martin
Vincent C. Martin Jr., NCSP
Nationally Certified School Psychologist

Martin, Vinny

From: [Redacted]

Sent: Thursday, August 30, 2001, 12.29PM

To: Rschubothe@fgsd.k12.or.us;
Mwanner@fgsd.k12.or.us;
Lshofner@fgsd.k12.or.us;
Vmartin@fgsd.k12.or.us

Subject [Redacted]

Hi all, I am writing in regards to my son [Redacted] and hoping to communicate before the rush of the school year begins.

[Redacted] was a freshman last year and took pre-algebra and failed. He is in the class again this year. We requested testing on [Redacted] last year through his counselor, Ms. Kaufman. After the testing, I met with Vinny and Lorna and talked about the results.

Vinny explained that if you just look at [Redacted] math scores on these tests he may have a learning disability and qualify for some special education in math. His overall scores were okay. However, he did do very poorly overall in school last year.

[Redacted] and we, his parents, are extremely concerned about his ability to comprehend and apply math. I am asking that the test results be shared with Mr. Schubothe, and Mr. Wanner, (who will be his pre-algebra teacher this semester) and discussed in collaboration with Vinny and Lorna. I am not sure if this is the proper way to go about it, but it is a start. We would like to see some individual attention such as tutoring. I am also thinking Mr. Schubothe and Mr. Wanner would like to meet with [Redacted] and develop some sort of plan for teaching [Redacted] in the areas the tests show he is low on.

[Redacted] has been in the FGSD since Kindergarten and still cannot do the most basic math functions. Surely there must be some method of teaching more appropriate for him. He is intelligent but apparently cannot process information or learn from the teaching methods used thus far.

Thank you-for your time and attention to this.

I would appreciate any help you can provide.

[Redacted]

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
FEB 25 2009
OFFICE OF THE CLERK

No. 08-305

IN THE

Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,
Petitioner,

v.

T.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PETITIONER

EAMON P. JOYCE
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300

GARY FEINERMAN*
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

RYAN C. MORRIS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

RICHARD COHN-LEE
ANDREA L. HUNGERFORD
THE HUNGERFORD LAW FIRM, LLP
P.O. Box 3010
Oregon City, OR 97045
(503) 650-7990

Counsel for Petitioner

*Counsel of Record

February 25, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Individuals with Disabilities Education Act permits a tuition reimbursement award against a school district and in favor of parents who unilaterally place their child in private school, where the child had not previously received special education and related services under the authority of a public agency.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
A. Statutory Background	2
B. Procedural History	8
SUMMARY OF THE ARGUMENT	14
ARGUMENT	16
I. AS AMENDED IN 1997, IDEA PRECLUDES TUITION REIMBURSEMENT FOR CHILDREN UNILATERALLY PLACED IN PRIVATE SCHOOL WHO HAVE NOT PREVIOUSLY RECEIVED SPECIAL EDUCATION SERVICES UNDER THE AUTHORITY OF A PUBLIC AGENCY	16
A. As Amended In 1997, IDEA Plainly And Categorically Precludes Tuition Reimbursement Here	19
B. At A Minimum, IDEA Does Not Unambiguously Impose A Tuition Reimbursement Obligation Here	27
C. T.A.'s Parents Are Ineligible For Tuition Reimbursement	28

TABLE OF CONTENTS – continued

Page

II. NONE OF THE NINTH CIRCUIT'S RATIONALES FOR ALLOWING TUITION REIMBURSEMENT HAS MERIT 28

A. The Ninth Circuit's Appeal To IDEA's Broad Purpose Does Not Support Its Interpretation 29

B. The Ninth Circuit's Reliance on *Burlington* Is Unavailing 30

C. The Ninth Circuit's Reliance On The Department's Interpretation Of IDEA Is Unavailing 33

D. The Ninth Circuit's Absurdity Rationale Is Unavailing 38

CONCLUSION 41

STATUTORY ADDENDUM ..... Add. 1

TABLE OF AUTHORITIES

CASES Page

Arlington Cent. Sch. Dist. Bd. of Educ. v. *Murphy*, 548 U.S. 291 (2006) ..... *passim*
Bd. of Educ. v. *Rowley*, 458 U.S. 176.... 16, 17, 40
Bd. of Governors of the Fed. Reserve Sys. v. *Dimension Fin. Corp.*, 474 U.S. 361 (1986) 30
Blanchard v. *Morton Sch. Dist.*, 509 F.3d 934 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 1447 (2008) 39
Bowen v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) 35
Cal. State Bd. of Optometry v. *FTC*, 910 F.2d 976 (D.C. Cir. 1990) 37
Carcieri v. *Salazar*, No. 07-526 (U.S. Feb. 24, 2009) 35
Chevron U.S.A., Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 34
Davis ex rel. Lashonda D. v. *Monroe County Bd. of Educ.*, 526 U.S. 629 (1999). 17
Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993) 6, 31, 33
Fla. Dep't of Rev. v. *Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326 (2008) 24
Forest Grove Sch. Dist. v. *T.A.*, 129 S. Ct. 987 (2009) 1
Gonzales v. *Oregon*, 546 U.S. 243 (2006)..... 35, 36
Greenland Sch. Dist. v. *Amy N.*, 358 F.3d 150 (1st Cir. 2004) 31
Gregory v. *Ashcroft*, 501 U.S. 452 (1991)..... 17, 37
Hardin v. *City Title & Escrow Co.*, 797 F.2d 1037 (D.C. Cir. 1986) 24
Honig v. *Doe.*, 484 U.S. 305 (1988) 17
Hunter ex rel. Hunter v. *Seattle Sch. Dist. No. 1*, 731 P.2d 19 (Wash. Ct. App. 1987). 32

TABLE OF AUTHORITIES – continued

Page

John v. *United States*, 247 F.3d 1032 (9th Cir. 2001) 36
Mass. Mut. Life Ins. Co. v. *Russell*, 473 U.S. 134 (1985) 22
Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992) 32
Patricia P. v. *Bd. of Educ.*, 203 F.3d 462 (7th Cir. 2000) 31
Pennhurst State Sch. and Hosp. v. *Halderman*, 451 U.S. 1 (1981) 17, 28
Ridgewood Bd. of Educ. v. *N.E. ex rel. M.E.*, 172 F.3d 238 (3d Cir. 1999) 39
Riegel v. *Medtronic, Inc.*, 128 S. Ct. 999 (2008) 34
Schaffer v. *Weast*, 546 U.S. 49 (2005) 4, 16, 40
Sch. Comm. of the Town of Burlington v. *Dep't of Educ.*, 471 U.S. 359 (1985) ..... *passim*
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 34
Solid Waste Agency v. *Army Corps of Eng'rs*, 531 U.S. 159 (2001) 37
South Dakota v. *Dole*, 483 U.S. 203 (1987) 16, 17
TRW Inc. v. *Andrews*, 534 U.S. 19 (2001) 22
Town of Burlington v. *Dep't of Educ.*, 736 F.2d 773 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985) 31
United States v. *Chem. Found., Inc.*, 272 U.S. 1 (1926) 40
Va. Dep't of Educ. v. *Riley*, 106 F.3d 559 (4th Cir. 1997), *superseded by statute on other grounds*, Pub. L. No. 105-17, 111 Stat. 37 (1997) 36
Winkelman v. *Parma City Sch. Dist.*, 127 S. Ct. 1994 (2007) 4, 16

TABLE OF AUTHORITIES – continued

Page

Wise v. *Ohio Dep't of Educ.*, 80 F.3d 177 (6th Cir. 1996) 32

CONSTITUTION, STATUTES AND REGULATIONS

U.S. Const. art. I, § 8, cl. 1 16
Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 ..... 2, 5
Handicapped Act, Pub. L. No. 91-230, tit. VI, 84 Stat. 175 (1970) 2
Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796.... 2
Individuals with Disabilities Education Act, Pub. L. No. 102-119, 105 Stat. 587 (1991) 2
Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 ..... 2, 6, 20, 24
Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 ..... 2, 3, 39
20 U.S.C. § 1400 *et seq.* 1
§ 1400(d) (2000 & Supp. II 2003). 3
§ 1401(8) (2000 & Supp. II 2003). 3
§ 1406(a) (2006) 34
§ 1412 (2000 & Supp. II 2003).. *passim*
§ 1414 (2000 & Supp. II 2003)..... 3, 4
§ 1415 (2000 & Supp. II 2003).. *passim*
§ 1415(d)(1)(A)(i) (Supp. IV 2004) 4
§ 1416 (2000 & Supp. II 2003)..... 3
§ 1417(b) (2000 & Supp. II 2003). 34
34 C.F.R. § 300.453 (1999) 21
§ 300.510(b)(1)-(2) 39

TABLE OF AUTHORITIES – continued

Page

34 C.F.R. § 300.515(a) 39
64 Fed. Reg. 12,406 (Mar. 12, 1999) 24, 35
71 Fed. Reg. 46,540 (Aug. 14, 2006) 34

LEGISLATIVE HISTORY

143 Cong. Rec. H2536 (daily ed. May 13, 1997) 25
H.R. Rep. No. 105-95 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78 26
S. Rep. No. 105-17 (1997) 26

OTHER AUTHORITY

Mount Bachelor Academy Web Site, *at* http://www.mtba.com (last visited Feb. 24, 2004) 12

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 523 F.3d 1078, and its order denying rehearing and rehearing en banc (Pet. App. 160a) is unreported. The opinions of the district court (Pet. App. 25a-55a) and the State of Oregon Office of Administrative Hearings (Pet. App. 56a-159a) are unreported.

JURISDICTION

The court of appeals entered judgment on April 28, 2008, and denied rehearing and rehearing en banc on June 5, 2008. The petition for a writ of certiorari was timely filed on September 3, 2008, and granted on January 16, 2009. 129 S. Ct. 987 (2009). This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

The parents of respondent T.A., then a high school junior suffering from drug abuse and depression, withdrew him from public school and placed him in an expensive private school. T.A.'s parents did so without asking petitioner Forest Grove School District ("District") to evaluate him for a disability under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, without informing the District that they believed T.A. was receiving a deficient public education, and without T.A. ever having received special education services from the District. Shortly thereafter, T.A.'s parents hired a

lawyer and commenced these proceedings, during which a hearing officer found T.A. disabled and ordered the District to reimburse his parents for tuition paid to the private school.

The question here is whether IDEA, in light of amendments enacted in 1997, permits a tuition reimbursement award to parents who unilaterally place their child in private school, when the child had not previously received special education services from the public school district. The district court held that IDEA, as amended, precluded such an award. The Ninth Circuit disagreed, but did so without acknowledging that IDEA is a Spending Clause statute, and thus without finding that IDEA unambiguously imposes a tuition reimbursement obligation under these circumstances.

A. Statutory Background

1. Congress first enacted IDEA, Pub. L. No. 102-119, 105 Stat. 587 (1991), as part of the Handicapped Act, Pub. L. No. 91-230, tit. VI, 84 Stat. 175 (1970), amending it in the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 ("1975 Amendments"), the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 ("1986 Amendments"), the Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 ("1997 Amendments"), and the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 ("2004 Amendments"). The purpose of IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and

related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A) (2000 & Supp. II 2003).[1]

Consistent with its purpose, IDEA provides funds to assist state and local agencies in educating children with disabilities, and conditions such assistance on compliance with numerous obligations expressly set forth in the statutory text. 20 U.S.C. § 1412(a)(1)-(22) (setting forth obligations); *id.* § 1416 (authorizing the Secretary of Education to withhold funds from noncompliant States); see also 2004 Amendments § 612(a)(1)-(25), 118 Stat. at 2676-2691, *codified at* 20 U.S.C. § 1412(a)(1)-(25) (2006) (imposing additional obligations). Among other things, States must ensure that "[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21." 20 U.S.C. § 1412(a)(1)(A). A "free appropriate public education" ("FAPE") means "special education and related services that" are "provided at public expense, under public supervision and direction." *Id.* § 1401(8).

To facilitate compliance with the FAPE obligation, IDEA requires school districts to create and implement an "individualized education program" ("IEP") for disabled children eligible for services under the Act. *Id.* § 1412(a)(4). An IEP is a written statement explaining a disabled child's needs and specifying the nature of the special services the school will provide. *Id.* § 1414(d)(1). Before an IEP may be developed, a state or local education agency must evaluate the child and determine that he or she

[1] Unless otherwise noted, all statutory citations are to the 2000 edition and 2003 supplement of the United States Code, which reflect the 1997 Amendments and set forth the version of IDEA at issue when this dispute arose.

is "disabled" within the meaning of IDEA. *Id.* § 1414(a)-(c). Prior to conducting any such evaluation, the agency must provide notice to the child's parents and obtain their informed consent. *Id.* § 1414(b)(1), (a)(1)(C)(i).

The development of and revision to an IEP is a collaborative process among the school district, teachers, and the child's parents or guardians. 20 U.S.C. §§ 1414(d)(1), (3), 1415(b)(1), (3). Recognizing that parents may be unsatisfied with a district's failure to evaluate their child, with the results of an evaluation, or with the district's proposed FAPE, IDEA provides a host of procedural safeguards that allow parents to seek redress at almost every stage of the process. *E.g.*, *id.* § 1415(a), (b), (f)-(i); see generally *Winkelman* v. *Parma City Sch. Dist.*, 127 S. Ct. 1994, 2000-2002 (2007); *Schaffer* v. *Weast*, 546 U.S. 49, 53-54 (2005).

Parents may request that their child be evaluated for a disability. 20 U.S.C. § 1414(a)(2)(A); see also *id.* § 1415(d)(1)(A)(i) (Supp. IV 2004). Parents must be given "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child." 20 U.S.C. § 1415(b)(6). Parents presenting such a complaint may elect mediation, *id.* § 1415(e), and, if mediation fails or is not pursued, may request an impartial due process hearing before a hearing officer provided, though not employed, by the state or local education agency, *id.* § 1415(f). And parents dissatisfied with the hearing officer's decision may seek review in federal court. *Id.* § 1415(i)(2). In any such lawsuit, the court "shall grant such relief as the court determines is appropriate," and may award attorneys' fees

to the parents, if they prevail. *Id.* § 1415(i)(2)(B)(iii), (3).

2. Prior to the 1997 Amendments, IDEA said little about the placement of disabled children in private school. One provision made clear that a State could refer a disabled child to a private school and, under those circumstances, would pay the tuition. See 1975 Amendments § 613(4)(B), 89 Stat. at 783 ("handicapped children in private schools and facilities will be provided special education and related services * * * at no cost to their parents * * * if such children are placed in or referred to such schools or facilities by the State"), *currently codified at* 20 U.S.C. § 1412(a)(10)(B). Before 1997, however, IDEA did not speak to responsibility for tuition where parents placed a child in private school without the public school's consent.

This Court addressed that issue in *School Committee of the Town of Burlington* v. *Department of Education*, 471 U.S. 359 (1985). *Burlington* concerned a disabled child who, after receiving special education services from a public school, was removed by his parents and placed in private school. The question presented was whether, when parents move a child from a public special education program to private school without the district's consent, and when the court ultimately finds the district's IEP to have been inadequate, the court may order the district to reimburse the parents for private school tuition. *Id.* at 367. This Court held that such reimbursement could be ordered under IDEA's general grant of remedial authority, which provides: "In any action brought under this paragraph the court * * * shall grant such relief as the court determines is appropriate." 1975 Amendments § 615(e)(2), 89 Stat. at 789, *recodified at* 20 U.S.C.

§ 1415(i)(2)(B)(iii). According to the Court, "[a]bsent other reference" in IDEA, "the only possible interpretation" of the general remedial provision was that tuition reimbursement was an "'appropriate'" remedy "in light of the purpose of the Act." *Burlington*, 471 U.S. at 369; see also *Florence County Sch. Dist. Four* v. *Carter*, 510 U.S. 7, 13-15 (1993) (applying *Burlington* and further defining circumstances under which parents are eligible under § 1415(i)(2)(B)(iii) for reimbursement in unilateral placement cases).

3. The 1997 Amendments comprehensively set forth the States' obligations to disabled children in private schools. See 1997 Amendments § 612(a)(10), 111 Stat. at 62 ("CHILDREN IN PRIVATE SCHOOLS"), *codified at* 20 U.S.C. § 1412(a)(10). The Amendments retained the then-existing provision requiring a state or local agency to pay private school tuition where a child is placed in or referred to a private school by the agency. 20 U.S.C. § 1412(a)(10)(B). In addition, Congress in the face of conflicting circuit court decisions clarified that another then-existing provision did not obligate States to spend their *own* funds on disabled children placed by their parents in private schools outside the typical IDEA process. *Id.* § 1412(a)(10)(A); see generally Br. of the United States as *Amicus Curiae*, *K.R.* v. *Anderson Cmty. Sch. Corp.* (U.S. Jun. 4, 1997) (No. 96-323) ("U.S. *K.R.* Brief"), *available at* 1997 WL 33561754.

Pertinent here, Congress expressly addressed for the first time whether and, if so, under what circumstances a public school district must provide tuition reimbursement to parents who unilaterally enroll their children in private school without the district's consent:

> (C) PAYMENT FOR EDUCATION OF CHILDREN ENROLLED IN PRIVATE SCHOOLS WITHOUT CONSENT OF OR REFERRAL BY THE PUBLIC AGENCY.
>
> (i) IN GENERAL. * * * [T]his subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a [FAPE] available to the child and the parents elected to place the child in such private school or facility.
>
> (ii) REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a [FAPE] available to the child in a timely manner prior to that enrollment.

20 U.S.C. § 1412(a)(10)(C)(i)-(ii). Accordingly, § 1412(a)(10)(C)(ii) permits tuition reimbursement where the public school district does not provide a FAPE to a disabled child, where the child's parents enroll the child in private school without the district's consent, and where the child previously received special education services from the district. Even when those conditions are satisfied, Congress further provided that reimbursement "may be reduced or denied" under certain circumstances. *Id.* § 1412(a)(10)(C)(iii)-(iv).

B. Procedural History

1. T.A. was enrolled in the District from kindergarten until March 2003, the spring of his junior year at Forest Grove High School ("FGHS"). Pet. App. 26a-34a. T.A. never received special education services from the District or any other public agency. *Ibid.*

T.A. experienced emotional, behavioral, and educational difficulties while attending FGHS. Pet. App. 26a-27a, 29a-31a, 61a. During his freshman year, his physician referred him to a therapist due to depression and susceptibility to mood swings. *Id.* at 64a. In December 2000, the FGHS guidance counselor recommended that T.A. be evaluated for eligibility for special education services. *Id.* at 26a-27a.

The District provided T.A.'s mother with notice that it sought to evaluate him for a disability, and she consented. Pet. App. 65a-66a. The District provided T.A.'s parents with notice of their procedural safeguards under IDEA. *Id.* at 28a-29a. Among other things, the notice stated that parents may be reimbursed for the "cost of private school placement made without the consent of or referral by the school district *only if* * * * the child received special education and related services under the authority of a public agency before enrolling in the private school." *Id.* at 28a (emphasis added).

The District formed a multidisciplinary team to conduct the evaluation. Pet. App. 3a, 27a, 66a. In Spring 2001, a special education teacher observed that T.A. was quiet, worked independently, and behaved appropriately in class. *Id.* at 27a. In June 2001, in response to the District's request for a medical statement addressing whether T.A. had health conditions that would affect his educational

performance, T.A.'s primary care medical provider reported only that T.A. needed glasses. *Id.* at 67a. Also in June, a FGHS psychologist evaluated T.A. for a learning disability and concluded that the symptoms listed in the referral did not merit an evaluation for ADHD. *Id.* at 27a, 70a; see also *id.* at 71a-72a (results of cognitive testing).

On June 13, 2001, T.A.'s mother met with a school psychologist, a learning disability specialist, and a learning specialist and special needs coordinator to review the results of the evaluations. Pet. App. 27a, 67a, 72a. Everyone present, including T.A.'s mother, agreed that T.A. did not have a disability and was not eligible for special education. *Id.* at 27a. T.A.'s parents never requested another special education evaluation while T.A. was enrolled in the District, and FGHS personnel did not refer T.A. for such an evaluation. *Id.* at 28a.

2. T.A. progressed from grade-to-grade, but continued to have behavioral problems. Pet. App. 29a. During the fall of his sophomore year, T.A. was suspended for bringing a knife to school, *ibid.*, and his six-week progress report was poor, *id.* at 78a. Soon thereafter, T.A.'s older sister began tutoring him, and by twelve weeks into the term his "grades had greatly improved." *Id.* at 29a. However, T.A. used marijuana in the winter of 2002, *id.* at 30a, and during the same period refused to cooperate with his sister under the terms of their tutoring arrangement, *id.* at 78a. His grades then fell. *Id.* at 30a, 78a-79a.

At the start of his junior year, T.A. admitted marijuana use to his parents and told them "that he really wanted to change things." Pet. App. 30a, 81a. His first progress report that year "was his best in high school with four As, two Bs, and one C/D." *Id.* at 30a. T.A. then grew reclusive, *id.* at 81a, and by

November 2002 was falling behind in school and having mood swings and angry outbursts, *id.* at 30a. T.A. also began using marijuana with increasing frequency, to the point that he was "so drugged" at times that he "could not get out of bed or speak." *Ibid.*; see *id.* at 86a-87a.

In January 2003, T.A.'s parents took him to see Dr. Michael J. Fulop, Psy.D., for an initial diagnostic interview concerning his "odd pattern of behavior." J.A. 31 (assessment conducted into T.A.'s "depressive ideation, irritability, impulsiveness, and over-dependence on his family"); see also Pet. App. 31a. Additionally, T.A.'s father arranged with FGHS for T.A. to apply to finish high school through the "Partnership Program" at Portland Community College ("PCC"). Pet. App. 31a.

In the meantime, T.A. continued to use marijuana, his inappropriate Internet use caused his parents to remove the computer from the home, and he also made over $1000 worth of phone calls to adult chat lines. Pet. App. 30a, 87a. T.A. ran away from home on February 11, 2003. *Ibid.* Police picked up T.A. three days later and returned him home. *Id.* at 31a, 87a. T.A.'s parents then took him to meet with his therapist, Dr. Susan Patchin, Psy.D., whom he had seen since April 2000 for school and anger issues. *Ibid.* T.A. refused to stop using marijuana, control his outbursts, or obey his parents. *Ibid.*

On February 21 and 24, 2003, T.A. underwent testing and evaluation by Dr. Fulop. Pet. App. 31a. On February 27, T.A.'s father informed FGHS that T.A. was undergoing medical testing, was going to enter a three-week wilderness training program, and then would attend PCC. *Ibid.* The next day, T.A.'s father told FGHS that T.A. was enrolled at PCC, had completed the necessary placement tests, and had

met with an advisor. *Ibid.* On March 10, 2003, T.A.'s father informed the assistant principal that T.A. was "officially disenrolled" from FGHS and was registered at PCC. *Id.* at 32a. Neither T.A. nor his parents expressed any dissatisfaction with his placement at PCC, and the assistant principal understood that T.A. was attending PCC as of the beginning of the spring quarter. *Ibid.*

Meanwhile, on March 2, 2003, T.A. commenced a program at Catherine Freer Wilderness Therapy Expeditions ("Freer"). Pet. App. 31a-32a. Freer admitted him because of his "substance abuse and oppositional behavior." *Id.* at 31a; see also *id.* at 33a; J.A. 61. On March 12, Freer recommended to T.A.'s parents that T.A. be placed in a structured out-of-home facility that could address his drug use and depression. Pet. App. 32a.

On March 14, 2003, Dr. Fulop discussed with T.A.'s parents the results of his evaluation. Pet. App. 32a. He diagnosed T.A. with ADHD (combined subtype) and dysthmic disorder (a form of depression characterized by long-term symptoms, such as sadness). *Ibid.* He found that T.A. had several learning problems and academic limitations, as well as "math disorder and cannabis abuse." *Id.* at 32a-33a. Dr. Fulop recommended that T.A. attend the residential treatment program at Mount Bachelor Academy ("Academy") because he needed an environment that could address his drug abuse, school difficulties, ADHD, and depression. *Id.* at 33a; see also *id.* at 99a (describing T.A. as "'most likely suffering from a primary alcohol and drug problem'").

On March 24, 2003, two days after his discharge from Freer, T.A. began attending the Academy. Pet. App. 33a-34a. T.A.'s father reported to the Academy that T.A.'s enrollment was precipitated by "'inappro-

priate behavior, depression, opposition, drug use, [and] runaway.'" *Id.* at 105a. The Academy states that it provides a "well-rounded academic and emotional growth curriculum that is designed for children who may have academic, behavioral, emotional, or motivational problems." *Id.* at 34a (internal quotation marks omitted); see also http://www.mtba.com (last visited Feb. 24, 2009). Monthly tuition was $5,200. Pet. App. 34a.

3. Four days after T.A. enrolled in the Academy, his parents hired a lawyer. Pet. App. 34a. On April 18, 2003, they requested a hearing seeking an order requiring the District to evaluate T.A. in all areas of suspected disability. *Ibid.* This was the first time District officials learned that T.A. was not attending PCC. *Id.* at 35a.

District officials evaluated T.A. and reviewed his records. Pet. App. 35a-36a. On July 7, 2003, a multidisciplinary team assembled to determine T.A.'s eligibility for services under IDEA. *Id.* at 36a-37a. Present at the meeting were T.A.'s parents, Dr. Patchin (T.A.'s therapist), and several officials from the District and FGHS. *Ibid.* Everyone in attendance except T.A.'s parents and Dr. Patchin concluded that T.A. did not qualify for special education. *Id.* at 37a. The team found that T.A.'s ADHD was not a qualifying disability because it did not adversely impact his educational performance. *Ibid.*

4. T.A.'s parents requested an impartial due process hearing, which was held in September and October 2003. Pet. App. 38a; see also *id.* at 56a-159a. The hearing officer concluded that the District had not shown that T.A. received a FAPE while at FGHS, reasoning that his ADHD adversely impacted his educational performance and thus made him eligible under IDEA. *Id.* at 38a-39a. Among other things,

the hearing officer ordered the District to reimburse T.A.'s parents for the cost of sending him to the Academy. *Id.* at 39a-40a; *id.* at 158a.

5. The District brought suit to challenge the hearing officer's order. The district court accepted the hearing officer's factual findings, but held that IDEA barred the tuition reimbursement award because T.A. had not received special education services from the District before his parents unilaterally placed him at the Academy. Pet. App. 49a-51a. The court found it undisputed that T.A.'s parents agreed with the 2001 ineligibility determination; that they never requested another evaluation; that they removed T.A. from the District for reasons unrelated to special education services; and that T.A. never received special education services from the District. *Id.* at 51a. Accordingly, the district court concluded that T.A. was "not within the category of children eligible for tuition reimbursement" under 20 U.S.C. § 1412(a)(10)(C). *Ibid.*

6. A divided panel of the Ninth Circuit reversed. T.A. conceded that he did "not meet the statutory requirements under 20 U.S.C. § 1412(a)(10)(C), because he had not 'previously received special education and related services.'" Pet. App. 11a. The panel concluded, however, that this did not bar T.A. from receiving tuition reimbursement under IDEA. *Id.* at 14a-15a.

According to the Ninth Circuit, § 1412(a)(10)(C)(ii) is ambiguous because it "does not *clearly* create a categorical bar" to tuition reimbursement when the child did not previously receive special education services from a public agency. Pet. App. 14a. The court reasoned that although "Congress chose to specify in § 1412(a)(10)(C) the requirements and factors to be considered by district courts and hearing

officers when deciding whether to award reimbursement to students who previously received special education and related services," "[f]or students who never received" such services, "the new provisions of § 1412(a)(10)(C) simply do not apply." *Id.* at 16a. Rather, students like T.A. "are eligible for reimbursement[] to the same extent as before the 1997 amendments, as 'appropriate' relief pursuant to" 20 U.S.C. § 1415(i)(2)(B)(iii). *Ibid.*

In so holding, the Ninth Circuit did not acknowledge that IDEA was enacted pursuant to Congress's powers under the Spending Clause. Nor did the Ninth Circuit interpret IDEA in light of the principle, reaffirmed nearly two years earlier in *Arlington Central School District Board of Education* v. *Murphy*, 548 U.S. 291 (2006), that school districts may be subject to liability under IDEA only insofar as the statute "'unambiguously'" imposes such liability. *Id.* at 296.

SUMMARY OF THE ARGUMENT

IDEA is a Spending Clause statute, and the Spending Clause requires Congress to give clear notice of any obligation it imposes on the States as a condition of receiving federal funds. Far from unambiguously providing that public school districts may be liable for tuition reimbursement awards to parents who unilaterally place in private school a child, like T.A., who did not previously receive special education services from the district, the 1997 Amendments to IDEA clearly preclude such awards. This conclusion flows from the text, structure, and history of the 1997 Amendments, which set forth in detail the circumstances under which school districts are responsible for tuition reimbursement circumstances not present here.

Even if the statutory text were ambiguous regarding a school district's tuition reimbursement obligation to students like T.A., the Ninth Circuit erred in resolving that ambiguity against the District. Under this Court's Spending Clause jurisprudence, such ambiguities must be resolved in the State's favor, not the claimant's. Accordingly, because T.A. admits he did not receive special education services from the District prior to enrolling at the Academy, tuition reimbursement is not an available remedy.

The Ninth Circuit's other rationales for allowing tuition reimbursement are without merit. The Ninth Circuit appealed to IDEA's overarching goal of providing a FAPE to all disabled children, but IDEA does not promote that goal at the expense of fiscal and other considerations reflected in Congress's decision to foreclose tuition reimbursement in cases like these. The Ninth Circuit's reliance on *Burlington* is doubly flawed in that *Burlington*: (i) did not address the issue here the availability of tuition reimbursement following the unilateral private school placement of a child who never received special education services from the school district; and (ii) interpreted an earlier iteration of IDEA, twelve years before the 1997 Amendments articulated precisely when school districts are obligated to provide tuition reimbursement to parents of children unilaterally placed in private school.

The Ninth Circuit's reliance on the Department of Education's interpretive commentary is equally unavailing. No deference is owed because IDEA clearly precludes tuition reimbursement here, and even if the Act were ambiguous, the Spending Clause would require resolving that ambiguity against reimbursement. Finally, the Ninth Circuit wrongly concluded that the District's reading of IDEA leads to

absurd results. The numerous procedural protections provided by IDEA ensure that disabled children will not languish if parents cannot recover tuition reimbursement for children who have not previously received special education services. To the contrary, it is the Ninth Circuit's reasoning that leads to untenable results.

ARGUMENT

I. AS AMENDED IN 1997, IDEA PRECLUDES TUITION REIMBURSEMENT FOR CHILDREN UNILATERALLY PLACED IN PRIVATE SCHOOL WHO HAVE NOT PREVIOUSLY RECEIVED SPECIAL EDUCATION SERVICES UNDER THE AUTHORITY OF A PUBLIC AGENCY.

It has long been settled that Congress enacted IDEA pursuant to its Spending Clause power, Art. I, § 8, cl. 1. See *Winkelman* v. *Parma City Sch. Dist.*, 127 S. Ct. 1994, 2006 (2007); *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 295 (2006); *Schaffer* v. *Weast*, 546 U.S. 49, 51 (2005); *Bd. of Educ.* v. *Rowley*, 458 U.S. 176, 190 n.11, 204 n.26 (1982). When exercising its Spending Clause authority, "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives'" including objectives "not thought to be within Article I's 'enumerated legislative fields'" "'by conditioning receipt of federal moneys upon compliance * * * with federal statutory and administrative directives.'" *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987) (citations omitted). When attaching such "conditions to a State's acceptance of federal funds," however, "the conditions must be set out 'unambiguously.'"

Arlington, 548 U.S. at 296 (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)).

The Spending Clause plain statement rule is rooted in federalism. See *Dole*, 483 U.S. at 207-208; *Pennhurst*, 451 U.S. at 17; *Davis ex rel. Lashonda D.* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 654-655 (1999) (Kennedy, J., dissenting); see also *Gregory* v. *Ashcroft*, 501 U.S. 452, 457, 469-470 (1991) (importing Spending Clause plain statement rule). The rule has particular resonance here, as education is "perhaps the most important function of state and local governments." *Honig* v. *Doe*, 484 U.S. 305, 309 (1988) (internal quotation marks omitted); accord, *Rowley*, 458 U.S. at 208 n.30. So, when States cede their traditional authority over education in exchange for federal funds disbursed pursuant to Spending Clause legislation, the exchange "is much in the nature of a contract." *Pennhurst*, 451 U.S. at 17. Congress's power to impose conditions on the receipt of federal funds "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Ibid.* Those terms must be articulated in the statutory text. See *ibid.* (holding that "if *Congress* intends to impose a condition on the grant of federal moneys, *it* must do so unambiguously," and "insisting that *Congress* speak with a clear voice"; (emphases added); accord, *Dole*, 483 U.S. at 207.

The Court applied these principles in *Arlington*, which considered whether 20 U.S.C. § 1415(i)(3)(B), an IDEA provision authorizing a court to award "reasonable attorneys' fees as part of the costs" to prevailing parents, allowed an award of expert fees and expenses. 548 U.S. at 293-294. Recognizing that IDEA is a Spending Clause statute, the Court "view[ed] the IDEA from the perspective of a state official who is engaged in the process of deciding

whether the State should accept IDEA funds and the [attendant] obligations," and asked "whether such a state official would clearly understand that" the "liability at issue" is "one of the obligations of the Act." *Id.* at 296. "In other words," the Court added, "we must ask whether the IDEA furnishes clear notice regarding" a school district's "liability" for expert fees incurred by a prevailing parent. *Ibid.*

The Court held that IDEA provided no such notice. Examining the statutory text, the Court noted that § 1415(i)(3)(B), which authorized "an award of 'reasonable attorneys' fees,'" "does not even hint that acceptance of IDEA funds makes a State responsible for reimbursing prevailing parents for services rendered by experts." 548 U.S. at 297. The Court then pointed to 20 U.S.C. § 1415(i)(3)(C)-(G), which "contains detailed provisions * * * designed to ensure that [attorney fee] awards are indeed reasonable." 548 U.S. at 298. As the Court explained, the fact that IDEA includes no "comparable provisions relating to expert fees strongly suggests that recovery of expert fees is not authorized." *Ibid.*

Given this, the Court concluded that "the terms of the IDEA overwhelmingly support the conclusion that prevailing parents may not recover the costs of experts or consultants," and that "[c]ertainly the terms of the IDEA fail to provide the clear notice that would be needed to attach such a condition to a State's receipt of IDEA funds." *Id.* at 300. The Court reached this conclusion even though the Conference Committee Report expressly stated the conferees' intention "'that the term "attorneys' fees as a part of the costs" [in § 1415(i)(3)(B)] include reasonable expenses and fees of expert witnesses.'" *Id.* at 304 (quoting H.R. Conf. Rep. No. 99-687, at 5, *reprinted in* 1986 U.S.C.C.A.N. 1807, 1808). Placing primacy on

the statutory text, the Court cautioned that "[i]n a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds." *Ibid.*

Like the parents in *Arlington*, T.A. relies upon a remedial provision in § 1415(i) to justify his claim for private school tuition reimbursement. The Ninth Circuit agreed, holding that 20 U.S.C. § 1415(i)(2)(B)(iii) which provides that "the court * * * shall grant such relief as the court determines is appropriate" allows hearing officers and courts to award tuition reimbursement to children unilaterally placed in private school without first having received special education services from the school district. This was error. Congress amended IDEA in 1997 to permit tuition reimbursement for children sent to private school without the school district's consent or referral, but *only* if the child "previously received special education and related services under the authority of a public agency." 20 U.S.C. § 1412(a)(10)(C)(ii). Given this provision and others, it cannot possibly be said that IDEA unambiguously obligates school districts, as a condition of receiving federal funds, to reimburse parents for private school tuition under the circumstances present here.

A. As Amended In 1997, IDEA Plainly And Categorically Precludes Tuition Reimbursement Here.

IDEA has a general remedial provision requiring "the court * * * [to] grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(B)(iii). The Ninth Circuit held that this provision allows a hearing officer to order a public school district to provide tuition reimbursement to

parents who unilaterally place a child in private school, where the child did not previously receive special education services from the district. Pet. App. 12a-18a. This holding cannot be reconciled with the text and structure of IDEA. As amended in 1997, IDEA categorically prohibits reimbursement under those circumstances, which means that such reimbursement can never be "appropriate" under § 1415(i)(2)(B)(iii).

Prior to 1997, IDEA did not expressly address whether and, if so, under what circumstances school districts were obligated to provide tuition reimbursement to parents who placed their children in private school without the district's consent or referral. In 1997, Congress amended IDEA to address that issue, in a subsection entitled "PAYMENT FOR EDUCATION OF CHILDREN ENROLLED IN PRIVATE SCHOOLS WITHOUT CONSENT OF OR REFERRAL BY THE PUBLIC AGENCY." 1997 Amendments § 612(a)(10)(C), 111 Stat. at 63, *codified at* 20 U.S.C. § 1412(a)(10)(C).

Section 1412(a)(10)(C)(i) considers children unilaterally placed in private school where the public school district made a FAPE available:

> (i) IN GENERAL. Subject to subparagraph (A), this subchapter does not require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a [FAPE] available to the child and the parents elected to place the child in such private school or facility.

20 U.S.C. § 1412(a)(10)(C)(i). For those children, IDEA does not require the district to reimburse parents for private school tuition. The district's only obligation to those children is to allocate to them

under § 1412(a)(10)(A) a proportionate share of the federal funds received under IDEA. See *id.* § 1412(a)(10)(A)(i)(I)-(III); 34 C.F.R. § 300.453 (1999); see generally U.S. *K.R.* Br. at 9-10, 12-13, 18.

Section 1412(a)(10)(C)(ii) considers children unilaterally placed in private school where the public school district did *not* make a FAPE available:

> (ii) REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT If the parents of a child with a disability, *who previously received special education and related services under the authority of a public agency*, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a [FAPE] available to the child in a timely manner prior to that enrollment.

20 U.S.C. § 1412(a)(10)(C)(ii) (emphasis added). Thus, if the district does not make a FAPE available prior to a child's enrollment in private school, this provision allows a court or hearing officer to award tuition reimbursement, but only if the child previously received special education services from the district.

Neither § 1412(a)(10)(C) nor any other provision in IDEA expressly grants courts and hearing officers the authority to award tuition reimbursement under any other circumstances including circumstances where, as here, parents unilaterally place in private school a child who had not received special education services under the authority of a public agency. It follows that reimbursement is not available under those

circumstances. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) ("The most natural reading of § 1681p is that Congress implicitly excluded a general discovery rule by explicitly including a more limited one.") (citing *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)); *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 147 (1985) (the "'presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme'") (citation omitted). Such an award, in other words, cannot be "appropriate" relief within the meaning of § 1415(i)(2)(B)(iii).

This conclusion flows from *Arlington*. As noted above, *Arlington* considered whether IDEA permits prevailing parents to recover expert fees and expenses. In the abstract, a court might reasonably find it appropriate to allow such recoveries. See 548 U.S. at 307 (Ginsburg, J., concurring) (noting that Congress "wisely might have included" a provision allowing recovery of expert fees); *id.* at 313-316 (Breyer, J., dissenting) (explaining why allowing such recovery would be sound as a matter of policy). But decisions regarding appropriate relief under IDEA are not made in the abstract; they are made, rather, in the context of a comprehensive statutory scheme that details the relief available to prevailing parents. Because the provision specifically addressing litigation costs, § 1415(i)(3)(B), does not mention expert fees, the Court concluded that IDEA prohibits parents from recovering the costs of experts. See *id.* at 297 (while § 1415(i)(3)(B) "provides for an award of 'reasonable attorneys' fees,'" it "does not even hint that acceptance of IDEA funds makes a State responsible for reimbursing prevailing parents for services rendered by experts"). By the same token,

the IDEA provision specifically addressing tuition reimbursement for children unilaterally placed in private school, § 1412(a)(10)(C), "does not even hint" at reimbursement for students who had not previously received special education services from the school district. *Ibid.* Under the reasoning in *Arlington*, IDEA prohibits tuition reimbursement for those students.

Other textual clues in IDEA confirm this conclusion. *First*, immediately following the authorization in § 1412(a)(10)(C)(ii) for tuition reimbursement to parents who unilaterally place in private school a child who previously received special education services from the district, IDEA sets forth "detailed provisions that are designed to ensure that such awards are indeed reasonable." *Arlington*, 548 U.S. at 298. Those provisions articulate standards to guide the discretion of courts and hearing officers in awarding, reducing, or even denying tuition reimbursement to such parents. 20 U.S.C. § 1412(a)(10)(C)(iii)-(iv). As the Ninth Circuit acknowledged, IDEA does not provide any standards regarding tuition reimbursement for children, like T.A., who are unilaterally placed in private school without first having received special education services from the school district. Pet. App. 16a. As *Arlington* recognized, "[t]he absence of any comparable provisions" guiding the reduction or denial of tuition reimbursement for those children "suggests that [such reimbursement] is not authorized." 548 U.S. at 298.

Second, § 1412(a) provides that "[a] State is eligible" for federal financial assistance if it "demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets" approximately two dozen sets of

conditions. 20 U.S.C. § 1412(a). The set of conditions pertaining to disabled children placed in private school is set forth in § 1412(a)(10), entitled "CHILDREN IN PRIVATE SCHOOLS." 1997 Amendments § 612(a)(10), 111 Stat. at 62, *codified at* 20 U.S.C. § 1412(a)(10). And, as noted above, the conditions pertaining specifically to tuition reimbursement are set forth in § 1412(a)(10)(C), entitled "PAYMENT FOR EDUCATION OF CHILDREN ENROLLED IN PRIVATE SCHOOLS WITHOUT CONSENT OF OR REFERRAL BY THE PUBLIC AGENCY," and § 1412(a)(10)(C)(ii), entitled "REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT." *Id.* § 612(a)(10)(C), 111 Stat. at 63, *codified at* 20 U.S.C. § 1412(a)(10)(C). Those headings were "not added by the publisher or codifier, but w[ere] part of the Act as written and passed by Congress," and thus "constitute[] an indication of congressional intent." *Hardin* v. *City Title & Escrow Co.*, 797 F.2d 1037, 1039 (D.C. Cir. 1986); see also *Fla. Dep't of Revenue* v. *Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2336 (2008). It is difficult to imagine that Congress would have specified the States' tuition reimbursement obligations under provisions with the categorical and pellucid headings "REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT" and "PAYMENT FOR EDUCATION OF CHILDREN ENROLLED IN PRIVATE SCHOOLS WITHOUT CONSENT OF OR REFERRAL BY THE PUBLIC AGENCY," only to intend that § 1415(i)(2)(B)(iii), which does not mention tuition reimbursement, be construed to impose *additional* reimbursement requirements.

Third, there is a key difference between § 1415(i)(2)(B)(iii) and § 1412(a)(10)(C)(ii) in terms of the remedial authority each grants. Section 1415(i)(2)(B)(iii) provides that "*the court* * * * shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(B)(iii) (emphasis

added). Section 1412(a)(10)(C)(ii), by contrast, provides that "a court *or* a hearing officer" may require tuition reimbursement where the child previously received special education services. 20 U.S.C. § 1412(a)(10)(C)(ii) (emphasis added). Section 1412(a)(10)(C)(ii) is IDEA's only explicit grant of authority to hearing officers to award tuition reimbursement. Given its enactment of that provision, Congress cannot be thought to have intended § 1415(i)(2)(B)(iii), which grants authority only to "courts," to enable *hearing officers* to award tuition reimbursement beyond the scope permitted by § 1412(a)(10)(C)(ii).

Finally, insofar as it is relevant, the legislative history of the 1997 Amendments further confirms that § 612(a)(10)(C)(ii) prohibits tuition reimbursement in these circumstances. During the debate preceding enactment of the 1997 Amendments, Representative Castle stated:

> This law * * * has had unintended and costly consequences. * * * It has resulted in school districts unnecessarily paying expensive private school tuition for children. It has resulted in cases where lawyers have gamed the system to the detriment of schools and children * * * This bill makes it harder for parents to unilaterally place a child in elite private schools at public taxpayer expense, lowering costs to local school districts.

143 Cong. Rec. H2536 (daily ed. May 13, 1997); see also *ibid.* (IDEA previously had "resulted in school districts unnecessarily paying expensive private school tuition for children"). This floor statement is incompatible with the notion that Congress intended to authorize tuition reimbursement awards beyond

those expressly contemplated by the 1997 Amendments.

Even more telling are the House and Senate Reports to the 1997 Amendments, each stating:

> The bill makes a number of changes to clarify the responsibility of public school districts to children with disabilities who are placed by their parents in private schools.
>
> * * * *
>
> Section 612 [20 U.S.C. § 1412] * * * specifies that parents may be reimbursed for the cost of a private educational placement under certain conditions (i.e., when a due process hearing officer or judge determines that a public agency had not made a [FAPE] available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency's consent). *Previously, the child must have had received special education and related services under the authority of a public agency.*

H.R. Rep. No. 105-95, at 92-93 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 90 (emphasis added); see also S. Rep. No. 105-17, at 13 (1997) (same). The reports make clear that Congress, in "clarify[ing] the responsibility of public school districts to" children placed in private school, intended to permit tuition reimbursement only if the child "[p]reviously * * * received special education and related services." *Ibid.*; compare *Arlington*, 548 U.S. at 309-313, 323 (Breyer, J., dissenting) (noting that the legislative history of the 1986 Amendments supported the parents' claim to recover expert fees).

In sum, as amended in 1997, IDEA unambiguously imposes a categorical bar on tuition reimbursement

for parents who unilaterally place a child in private school, when the child did not previously receive special education services from the public school district. Accordingly, the Ninth Circuit's contrary judgment should be reversed irrespective of the Spending Clause "clear notice" requirement. See *Arlington*, 548 U.S. at 296-297 ("When the statutory 'language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd is to enforce it according to its terms.'"); *id.* at 307-308 (Ginsburg, J., concurring) (concluding, without applying the "clear notice" standard, that IDEA does not permit award of expert fees).

B. At A Minimum, IDEA Does Not Unambiguously Impose A Tuition Reimbursement Obligation Here.

Even if IDEA did not clearly prohibit tuition reimbursement awards for parents who unilaterally place in private school a child who had not received special education services from the school district, the Act is at best ambiguous on the subject. The Ninth Circuit agreed, holding that IDEA "is ambiguous because its text does not *clearly* create a categorical bar" to reimbursement under those circumstances. Pet. App. 14a.

In resolving that ambiguity against the District, the Ninth Circuit turned the Spending Clause on its head. As this Court made clear in *Arlington*, two years before the Ninth Circuit ruled, the question under the Spending Clause is not whether the statute clearly *relieves* the State of an obligation, but whether the statute clearly *imposes* the obligation. 548 U.S. at 296 ("when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out 'unambiguously'"). Thus, even if IDEA were ambiguous concerning tuition

reimbursement under the present circumstances, the ambiguity must be resolved in the District's favor, for an ambiguous statute, by definition, cannot provide the "clear notice" demanded by the Spending Clause. *Ibid.*; accord, *Pennhurst*, 451 U.S. at 17 ("if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously").

C. T.A.'s Parents Are Ineligible For Tuition Reimbursement.

Whether read plainly or through the lens of the Spending Clause, IDEA categorically prohibits tuition reimbursement to parents who unilaterally place in private school a child who has not previously received special education services from the public school district. T.A. has "concede[d] that * * * he does not meet the statutory requirements under 20 U.S.C. § 1412(a)(10)(C), because he had not 'previously received special education and related services.'" Pet. App. 11a. Accordingly, the District may not be required to reimburse T.A.'s parents for the cost of enrolling him at the Academy.

II. NONE OF THE NINTH CIRCUIT'S RATIONALES FOR ALLOWING TUITION REIMBURSEMENT HAS MERIT.

The Ninth Circuit's misinterpretation of IDEA, coupled with its failure to view IDEA through the lens of the Spending Clause, fatally undermines its holding that T.A.'s parents are not categorically precluded from receiving a tuition reimbursement award from the District. The Ninth Circuit's other rationales for permitting reimbursement here are without merit.

A. The Ninth Circuit's Appeal To IDEA's Broad Purpose Does Not Support Its Interpretation.

The Ninth Circuit held that interpreting IDEA "to prohibit categorically reimbursement to students who have not yet received special education and related services runs contrary to" the statute's "express purpose * * * 'to ensure that *all* children with disabilities have available to them a [FAPE].'" Pet. App. 15a (quoting 20 U.S.C. § 1400(d)(1)(A)). The parents in *Arlington* argued, in almost precisely the same terms, that allowing expert fee awards would "further[] the Act's overarching goal of" ensuring that all disabled children have available to them a FAPE. 548 U.S. at 303. This Court rejected that contention. Explaining that "IDEA obviously does not seek to promote" that overarching goal "at the expense of all other considerations, including fiscal considerations," the Court concluded that "[b]ecause the IDEA is not intended in all instances to further [such] broad goals * * * at the expense of fiscal considerations, [those] goals * * * do little to bolster" the parents' construction of the IDEA provision at issue. *Ibid.*

The same rationale governs here. While IDEA of course is intended to serve the goal of ensuring a FAPE for all disabled children, Congress also intended in the 1997 Amendments to cabin the liability of public school districts for private school tuition reimbursement. See *supra* at 20-27; see also U.S. *K.R.* Br. at 9-10, 12-13, 18 (recognizing congressional intent to limit financial obligations of States through other provisions of the 1997 Amendments). Section 1412(a)(10)(C) embodies the balance Congress struck in serving both goals simultaneously, and thus neither to its logical conclusion. By elevating the broad purpose of IDEA

"at the expense of [the] specific provisions" addressing tuition reimbursement, the Ninth Circuit "ignore[d] the complexity of the problems Congress [wa]s called upon to address and the dynamics of legislative action." *Bd. of Governors of the Fed. Reserve Sys.* v. *Dimension Fin. Corp.*, 474 U.S. 361, 373-374 (1986). Put another way, the Ninth Circuit's "[i]nvocation of the 'plain purpose' of [IDEA] at the expense of the terms of the statute," § 1412(a)(10)(C) in particular, "itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." *Id.* at 374.

B. The Ninth Circuit's Reliance On *Burlington* Is Unavailing.

The Ninth Circuit also relied on *School Committee of the Town of Burlington* v. *Department of Education*, 471 U.S. 359 (1985), to support its interpretation of IDEA. Pet. App. 12a, 15a. Decided more than a decade before Congress enacted the 1997 Amendments, *Burlington* considered whether IDEA's general remedial provision which then, as now, provided that "the court shall * * * grant such relief as the court determines is appropriate," 20 U.S.C. § 1415(i)(2)(B)(iii) allowed tuition reimbursement to parents who unilaterally placed their child in private school when the special education services provided by the public school were found inadequate. 471 U.S. at 361-362. At the time, IDEA was silent on the subject of tuition reimbursement to children unilaterally placed in private school. The Court concluded that, "[a]bsent other reference" in IDEA, "the only possible interpretation" of the general remedial provision was that tuition reimbursement was an "'appropriate'" remedy "in light of the purpose of the Act." *Id.* at 369. The Court reaffirmed

Burlington in another pre-1997 case, *Florence County School District Four* v. *Carter*, 510 U.S. 7, 15 (1993).

Burlington does not advance T.A.'s cause. Unlike T.A., the students in *Burlington* and *Carter* received special education services under the authority of a public agency and were subject to newly proposed IEPs before being unilaterally placed in private school. See *Carter*, 510 U.S. at 10-11; *Burlington*, 471 U.S. at 361-362. As *Carter* recognized, "in *all Burlington* reimbursement cases, the parents' rejection of the school district's proposed IEP is the very reason for the parents' decision to put their child in a private school." 510 U.S. at 13 (emphasis added). Here, by contrast, T.A.'s parents placed him in private school without giving the District the chance to evaluate him for eligibility under IDEA.

Accordingly, this matter does not fit the mold of a "*Burlington* reimbursement case[]," *ibid.*, which casts serious doubt on the notion that T.A.'s parents would have received tuition reimbursement under *Burlington*.[2] Conversely, under the District's reading

[2] Reflecting *Carter*'s description of what constitutes a "*Burlington* reimbursement case[]," most courts prior to the 1997 Amendments "thought it clear that, at a minimum [in order to recover reimbursement for a unilateral placement], the parents had to inform the school district of their concerns about their child's special needs and about the plan proposed *before removing* the child from public school." *Greenland Sch. Dist.* v. *Amy N.*, 358 F.3d 150, 159 (1st Cir. 2004) (emphasis added) (collecting cases); *see also, e.g.*, *Town of Burlington* v. *Dep't of Educ.*, 736 F.2d 773, 799 (1st Cir. 1984) (finding a "reasonable distinction" between "a unilateral parental transfer made after consultation with the school system, yet still an action without the system's agreement, and transfers made truly unilaterally, bereft of any attempt to achieve a negotiated compromise and agreement on a private placement"), *aff'd*, 471 U.S. 359 (1985); *Patricia P.* v. *Bd. of Educ.*, 203 F.3d 462, 468-469 (7th Cir. 2000)

of the 1997 Amendments, the students in *Burlington* and *Carter* would not have been categorically barred from receiving tuition reimbursement under § 1412(a)(10)(C)(ii).

Even if the pre-1997 version of § 1415(i)(2)(B)(iii), as interpreted in *Burlington*, would have permitted tuition reimbursement to T.A.'s parents, the post-1997 version still would not. As noted above, given IDEA's pre-1997 silence regarding tuition reimbursement for a child unilaterally placed in private school, *Burlington* interpreted the general "appropriate" relief provision "[a]bsent other reference" in IDEA clarifying what would be appropriate. 471 U.S. at 369. The 1997 Amendments, however, provided the "other reference" that was missing when the Court decided *Burlington*, expressly defining when reimbursement would be allowed where the child previously received special education services from the school district, tempered by various factors that allow the court to reduce or deny reimbursement. 20 U.S.C. § 1412(a)(10)(C)(ii)-(iv). Accordingly, as a "relic of the pre-[1997] regime," a general remedial provision like § 1415(i)(2)(B)(iii) cannot provide the reimbursement authority denied by the 1997 Amendments. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992).

("parents who, because of their failure to cooperate, do not allow a school district a reasonable opportunity to evaluate their disabled child, forfeit their claim for reimbursement"); *Wise* v. *Ohio Dep't of Educ.*, 80 F.3d 177, 184 (6th Cir. 1996) (reimbursement unavailable where parents fail to first make a formal complaint about their child's educational placement, or request placement in a different facility); *Hunter ex rel. Hunter* v. *Seattle Sch. Dist. No. 1*, 731 P.2d 19, 22 (Wash. Ct. App. 1987) (tuition reimbursement unavailable where district has not evaluated student prior to unilateral placement).

The Ninth Circuit's reliance on *Burlington* suffers from one final shortcoming. Section 1415(i)(2)(B)(iii) provides general remedial authority to "the court," not to a hearing officer. 20 U.S.C. § 1415(i)(2)(B)(iii). Both *Burlington* and *Carter* focus, appropriately, on a *court*'s authority to order tuition reimbursement under that provision. See *Carter*, 510 U.S. at 9-10, 12, 15-16; *Burlington*, 471 U.S. at 369-370, 374. Neither decision states, let alone suggests, that § 1415(i)(2)(B)(iii) vests *hearing officers* with the authority to require tuition reimbursement under any circumstances. Yet the Ninth Circuit relied on *Burlington* to hold that § 1415(i)(2)(B)(iii), which does not mention hearing officers or tuition reimbursement, empowers hearing officers to order tuition reimbursement beyond the scope allowed by § 1412(a)(10)(C). That reliance was badly misplaced.

C. The Ninth Circuit's Reliance On The Department's Interpretation Of IDEA Is Unavailing.

The Ninth Circuit also relied on the Department of Education's commentary accompanying regulations implementing the 1997 Amendments to support its interpretation of IDEA. Pet. App. 14a-15a n.9. The commentary stated that

> hearing officers and courts retain their authority, recognized in *Burlington* and [*Carter*] * * * to award 'appropriate' relief if a public agency has failed to provide FAPE, including reimbursement and compensatory services, under section [1415(i)(2)(B)(iii)] in instances in which the child has not yet received special education and related services. This authority is independent of their authority under [1412](a)(10)(C)(ii) to award reimbursement for private placements of children who previously

> were receiving special education and related services from a public agency.

64 Fed. Reg. 12,406, 12,602 (Mar. 12, 1999); see also 71 Fed. Reg. 46,540, 46,599 (Aug. 14, 2006) (same in commentary accompanying regulations implementing the 2004 Amendments). The Department's commentary is not entitled to deference under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), for three independent reasons.

First, the commentary is contrary to the clear language of IDEA. As shown above, *supra* at 20-27, Congress expressly limited recovery of private school tuition reimbursement in unilateral placement cases to circumstances where children previously received special education services from a public agency, 20 U.S.C. § 1412(a)(10)(C)(ii), and thus has "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Given this, the Department's contrary interpretation warrants no deference under either *Chevron*, see *ibid.*, or *Skidmore*, see *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999, 1009 (2008).

Second, the Department's commentary exceeded the scope of its delegated authority under IDEA. When the commentary was issued in 1997, IDEA authorized the Secretary to issue regulations "*only* to the extent that such regulations are *necessary* to ensure that there is compliance with the *specific* requirements of" IDEA. 20 U.S.C. § 1417(b) (emphasis added), *recodified at* 20 U.S.C. § 1406(a) (2006) (same). As shown above, nothing in IDEA *specifically* requires a school district to provide tuition reimbursement when a child unilaterally placed in private school had not previously received special education services from the district. It follows that the commentary was not "necessary to en-

sure * * * compliance with the specific requirements" of IDEA, and therefore that it falls outside the Department's (relatively narrow) zone of delegated authority. See *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."). Accordingly, the commentary is not entitled to *Chevron* deference. See *Gonzales* v. *Oregon*, 546 U.S. 243, 258 (2006); *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001); see also *Carcieri* v. *Salazar*, No. 07-526, slip op. at 2 (U.S. Feb. 24, 2009) (Breyer, J., concurring) (agency interpretation not entitled to *Chevron* deference when "Congress did not intend to delegate interpretative authority to the [agency]").

Although agency action outside the agency's delegated authority may still be entitled to *Skidmore* deference, see *Mead*, 533 U.S. at 234-235, none is warranted here. Like the Ninth Circuit's opinion, the Department's commentary rests on the doubly mistaken notion that *Burlington* and *Carter* held that § 1415(i)(2)(B)(iii): (1) authorizes hearing officers (2) to award tuition reimbursement to the parents of children who did not previously receive special education services from a public agency. See 64 Fed. Reg. at 12,602. The Department's misreading of *Burlington* and *Carter*, on top of its more fundamental error in failing to view IDEA through the lens of the Spending Clause, hardly reflects the degree of care warranting deference from this Court. See *Mead*, 533 U.S. at 228 ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care * * * and to the persuasiveness of the agency's

position.") (citing cases); see also *Gonzales*, 546 U.S. at 257-258 (agency's interpretation not entitled deference where, as here, its regulations merely "parrot" language of the statute).

Third, even putting aside the foregoing points, the Spending Clause prohibits the Department from interpreting IDEA to impose a tuition reimbursement obligation where a child is unilaterally placed in private school without first having received special education services from the district. Deference to an agency is appropriate where there is more than one permissible way to interpret a statute. There usually is more than one permissible way to interpret an ambiguous statute, but with a Spending Clause statute, ambiguity means that an obligation has not been "set out 'unambiguously,'" which in turn means that the statute may not be interpreted to impose that obligation. *Arlington*, 548 U.S. at 296. As Judge Kozinski explained,

> *Chevron* and the clear statement rule are * * * at loggerheads: If we must rely on the agency to divine the meaning of the statute, the meaning cannot be "plain to any reading" it. And, where Congress has not spoken plainly, it cannot be deemed to have abrogated an important incident of a state's sovereignty.

John v. *United States*, 247 F.3d 1032, 1046 (9th Cir. 2001) (en banc) (per curiam) (Kozinski, J., dissenting); *accord*, *Va. Dep't of Educ.* v. *Riley*, 106 F.3d 559, 567 (4th Cir. 1997) (en banc) (denying deference to EEOC because "[i]t is axiomatic that statutory ambiguity defeats altogether a claim by the Federal Government that Congress has unambiguously conditioned the States' receipt of federal monies"), *superseded by statute on other grounds*, IDEA Amendments of 1997, Pub. L. No. 105-17, 111 Stat.

37; *Cal. State Bd. of Optometry* v. *FTC*, 910 F.2d 976, 982 (D.C. Cir. 1990) (denying deference to FTC because "[t]he clear statement doctrine leaves no room for inferences. An agency may not exercise authority over States as sovereigns unless that authority has been unambiguously granted to it.").

Gregory v. *Ashcroft*, 501 U.S. 452 (1991), is instructive on this point. The dissent in *Gregory* argued that EEOC's interpretation of an ambiguous statute was entitled to *Chevron* deference and thus overrode a clear statement requirement analogous to that imposed under the Spending Clause. See *id.* at 493 (Blackmun, J., dissenting). The Court disagreed, explaining that "'to give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which [the Court has] relied to protect states' interests.'" *Id.* at 464 (alterations omitted) (quoting L. Tribe, *American Constitutional Law* § 6-25, at 480 (2d ed. 1988)); see also *Solid Waste Agency* v. *Army Corps of Eng'rs*, 531 U.S. 159, 172-173 (2001) (rejecting notion that *Chevron* deference applied to an agency's interpretation of an allegedly ambiguous statute subject to a clear statement rule, and noting Court's "assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority").

These principles make it inappropriate to accord deference to the Department's commentary. Because IDEA is, at best, ambiguous regarding the availability of tuition reimbursement where a child has not received special education services from a public agency, there is but one permissible outcome no obligation on the States—and thus no room for deference to the agency. To hold otherwise would deprive the Spending Clause's "clear notice" rule of

its intended force, as Congress, able to rely on agencies to fill gaps in ambiguous Spending Clause legislation, would no longer feel compelled to unambiguously set forth the conditions States must satisfy in exchange for federal funds.

D. The Ninth Circuit's Absurdity Rationale Is Unavailing.

Finally, the Ninth Circuit reasoned that the District's interpretation of the 1997 Amendments would "lead to the absurd result that the parents of a child with a disability must wait (an indefinite, perhaps lengthy period) until the child has received special education in public school before sending the child to an appropriate private school, no matter how uncooperative the school district and no matter how inappropriate the special education." Pet. App. 15a-16a. The Ninth Circuit added that "if the school district declined to recognize a student as disabled as occurred in this case the student would *never* receive special education in public school and therefore would *never* be eligible for reimbursement under § 1412(a)(10)(C)(ii)." *Id.* at 16a. This parade of horribles fails to account for the procedural safeguards parents enjoy under IDEA, fails to acknowledge that the District's interpretation is consistent with the statutory text and structure, and ignores the untenable results that flow from the Ninth Circuit's reading of IDEA.

The Ninth Circuit's suggestion that a child initially denied eligibility under IDEA would never receive special education services from the school district, thus rendering her permanently ineligible for tuition reimbursement under IDEA, is far-fetched. Under the 2004 Amendments, when a school district receives notice of a due process complaint, it has only ten days to respond with an explanation of its decision.

2004 Amendments § 615(c)(2)(B)(i)(I), 118 Stat. at 2718, *codified at* 20 U.S.C. § 1415(c)(2)(B)(i)(I) (2006). Within fifteen days of receiving the complaint, the district must convene a meeting with the child's parents and relevant team members to attempt to resolve the complaint. *Id.* § 615(f)(1)(B), 118 Stat. at 2720-2721, *codified at* 20 U.S.C. § 1415(f)(1)(B) (2006). If the matter is not resolved within thirty days of the district receiving the complaint, a due process hearing must be held, and the hearing officer must issue her final decision within 45 days of the expiration of the initial 30-day period. See 34 C.F.R. §§ 300.510(b)(1)-(2), 300.515(a). Parents dissatisfied with the hearing officer's decision can then bring suit in state or federal court. 2004 Amendments § 615(i)(2), 118 Stat. at 2723-2724, *codified at* 20 U.S.C. § 1415(i)(2) (2006).

Given these tight deadlines, it is highly unlikely that the circumstances hypothesized by the Ninth Circuit, where a child is forced to languish for years in some sort of limbo, would come to pass.[3] Moreover, the Ninth Circuit's assumption that school districts would be "uncooperative" and routinely obstruct children eligible for services under IDEA, Pet. App. 15a, runs contrary to the presumption that public school officials "properly perform[]" their duties under

[3] In any event, parents and children who ultimately prevail may seek to recover "compensatory education" to allow the child to continue in public education beyond the age of twenty-one to make up for the earlier deprivation. *See Ridgewood Bd. of Educ.* v. *N.E. ex rel. M.E.*, 172 F.3d 238, 249-250 & n.9 (3d Cir. 1999). Moreover, even if the procedural safeguards and remedies in the extreme case hypothesized by the Ninth Circuit prove insufficient, IDEA does not foreclose a remedy under the Americans with Disabilities Act or the Rehabilitation Act. 20 U.S.C. § 1415(*l*); *see Blanchard* v. *Morton Sch. Dist.*, 509 F.3d 934, 938 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 1447 (2008).

IDEA. *Schaffer*, 546 U.S. at 62-63 (Stevens, J., concurring); see also *Rowley*, 458 U.S. at 207-208; *United States* v. *Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) ("presumption of regularity" attends review of official acts of public official). Finally, Congress's decision to prohibit tuition reimbursement during certain timeframes for students who unilaterally withdraw from public schools reflects nothing more than the balance it struck between the competing interests at play, and can hardly be deemed absurd.

In fact, it is the Ninth Circuit's interpretation of IDEA that leads to untenable results. To justify its construction of IDEA, the Ninth Circuit concluded that "[f]or students who never received special education and related services, * * * the new provisions of § 1412(a)(10)(C) simply do not apply." Pet. App. 16a. The "new provisions" referenced by the Ninth Circuit include those that guide hearing officers and courts as to when tuition reimbursement may be reduced or denied altogether. 20 U.S.C. § 1412(a)(10)(C)(iii)-(iv).

Thus, the Ninth Circuit's reading of IDEA places a lower burden on parents whose children had never received special education from a public agency even those who never requested an evaluation or participated in the IEP process than parents whose children previously received special education from the public agency and were committed to the IEP process. This scheme would create a perverse incentive for parents to preemptively enroll a child in private school, without engaging the district regarding whether and, if so, what type of special education would be available for their child. That cannot possibly be what Congress had in mind when enacting the 1997 Amendments.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

EAMON P. JOYCE
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300

GARY FEINERMAN*
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

RYAN C. MORRIS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

RICHARD COHN-LEE
ANDREA L. HUNGERFORD
THE HUNGERFORD LAW FIRM, LLP
P.O. Box 3010
Oregon City, OR 97045
(503) 650-7990

Counsel for Petitioner

February 25, 2009

*Counsel of Record

ADDENDUM

STATUTORY ADDENDUM

FEDERAL STATUTES (2000 & SUPP. II 2003)

20 U.S.C. § 1412. STATE ELIGIBILITY

(a) IN GENERAL

A State is eligible for assistance under this subchapter for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions:

* * * *

(10) CHILDREN IN PRIVATE SCHOOLS

(A) CHILDREN ENROLLED IN PRIVATE SCHOOLS BY THEIR PARENTS

(i) IN GENERAL

To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this subchapter by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f) of this section:

(I) Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this subchapter.

(II) Such services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law.

(ii) CHILD-FIND REQUIREMENT

The requirements of paragraph (3) of this subsection (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including parochial, elementary and secondary schools.

(B) CHILDREN PLACED IN, OR REFERRED TO, PRIVATE SCHOOLS BY PUBLIC AGENCIES

(i) IN GENERAL

Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

(ii) STANDARDS

In all cases described in clause (i), the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies.

(C) PAYMENT FOR EDUCATION OF CHILDREN ENROLLED IN PRIVATE SCHOOLS WITHOUT CONSENT OF OR REFERRAL BY THE PUBLIC AGENCY

(i) IN GENERAL

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) LIMITATION ON REIMBURSEMENT

The cost of reimbursement described in clause (ii) may be reduced or denied

(I) if

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in division (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(7) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(iv) EXCEPTION.

Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement may

not be reduced or denied for failure to provide such notice if

(I) the parent is illiterate and cannot write in English;

(II) compliance with clause (iii)(I) would likely result in physical or serious emotional harm to the child;

(III) the school prevented the parent from providing such notice; or

(IV) the parents had not received notice, pursuant to section 1415 of this title, of the notice requirement in clause (iii)(I).

* * * *

(f) BY-PASS FOR CHILDREN IN PRIVATE SCHOOLS

(1) IN GENERAL

If, on December 2, 1983, a State educational agency is prohibited by law from providing for the participation in special programs of children with disabilities enrolled in private elementary and secondary schools as required by subsection (a)(10)(A) of this section, the Secretary shall, notwithstanding such provision of law, arrange for the provision of services to such children through arrangements which shall be subject to the requirements of such subsection.

(2) PAYMENTS

(A) DETERMINATION OF AMOUNTS

If the Secretary arranges for services pursuant to this subsection, the Secretary, after consultation with the appropriate public and private school officials, shall pay to the provider of such services for a fiscal year an amount per child

that does not exceed the amount determined by dividing

(i) the total amount received by the State under this subchapter for such fiscal year; by

(ii) the number of children with disabilities served in the prior year, as reported to the Secretary by the State under section 1418 of this title.

(B) WITHHOLDING OF CERTAIN AMOUNTS

Pending final resolution of any investigation or complaint that could result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State educational agency the amount the Secretary estimates would be necessary to pay the cost of services described in subparagraph (A).

(C) PERIOD OF PAYMENTS

The period under which payments are made under subparagraph (A) shall continue until the Secretary determines that there will no longer be any failure or inability on the part of the State educational agency to meet the requirements of subsection (a)(10)(A) of this section.

(3) NOTICE AND HEARING

(A) IN GENERAL

The Secretary shall not take any final action under this subsection until the State educational agency affected by such action has had an opportunity, for at least 45 days after receiving written notice thereof, to submit written objections and to appear before the Secretary or the Secretary's designee to show cause why such action should not be taken.

(B) REVIEW OF ACTION

If a State educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A), such agency may, not later than 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based the Secretary's action, as provided in section 2112 of Title 28.

(C) REVIEW OF FINDINGS OF FACT

The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive, but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify the Secretary's previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) JURISDICTION OF COURT OF APPEALS; REVIEW BY UNITED STATES SUPREME COURT

Upon the filing of a petition under subparagraph (B), the United States court of appeals shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon

certiorari or certification as provided in section 1254 of Title 28.

20 U.S.C. § 1415. PROCEDURAL SAFEGUARDS

(a) ESTABLISHMENT OF PROCEDURES

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

(b) TYPES OF PROCEDURES

The procedures required by this section shall include

(1) an opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(2) procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child) to act as a surrogate for the parents;

(3) written prior notice to the parents of the child whenever such agency

(A) proposes to initiate or change; or

(B) refuses to initiate or change;

the identification, evaluation, or educational placement of the child, in accordance with subsection (c) of this section, or the provision of a free appropriate public education to the child;

(4) procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so;

(5) an opportunity for mediation in accordance with subsection (e) of this section;

(6) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child;

(7) procedures that require the parent of a child with a disability, or the attorney representing the child, to provide notice (which shall remain confidential)

(A) to the State educational agency or local educational agency, as the case may be, in the complaint filed under paragraph (6); and

(B) that shall include

(i) the name of the child, the address of the residence of the child, and the name of the school the child is attending;

(ii) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(iii) a proposed resolution of the problem to the extent known and available to the parents at the time; and

(8) procedures that require the State educational agency to develop a model form to assist parents in filing a complaint in accordance with paragraph (7).

(c) CONTENT OF PRIOR WRITTEN NOTICE

The notice required by subsection (b)(3) of this section shall include

(1) a description of the action proposed or refused by the agency;

(2) an explanation of why the agency proposes or refuses to take the action;

(3) a description of any other options that the agency considered and the reasons why those options were rejected;

(4) a description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused action;

(5) a description of any other factors that are relevant to the agency's proposal or refusal;

(6) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and

(7) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter.

(d) PROCEDURAL SAFEGUARDS NOTICE

(1) IN GENERAL

A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents, at a minimum

(A) upon initial referral for evaluation;

(B) upon each notification of an individualized education program meeting and upon reevaluation of the child; and

(C) upon registration of a complaint under subsection (b)(6) of this section.

(2) CONTENTS

The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents, unless it clearly is not feasible to do so, and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to

(A) independent educational evaluation;

(B) prior written notice;

(C) parental consent;

(D) access to educational records;

(E) opportunity to present complaints;

(F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) mediation;

(J) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(K) State-level appeals (if applicable in that State);

(L) civil actions; and

(M) attorneys' fees.

(e) MEDIATION

(1) IN GENERAL

Any State educational agency or local educational agency that receives assistance under this subchapter shall ensure that procedures are established and implemented to allow parties to disputes involving any matter described in subsection (b)(6) of this section to resolve such disputes through a mediation process which, at a minimum, shall be available whenever a hearing is requested under subsection (f) or (k) of this section.

(2) REQUIREMENTS

Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f) of

this section, or to deny any other rights afforded under this subchapter; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) A local educational agency or a State agency may establish procedures to require parents who choose not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with

(i) a parent training and information center or community parent resource center in the State established under section 1482 or 1483 of this title; or

(ii) an appropriate alternative dispute resolution entity;

to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D) The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) An agreement reached by the parties to the dispute in the mediation process shall be set forth in a written mediation agreement.

(G) Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of such process.

(f) IMPARTIAL DUE PROCESS HEARING

(1) IN GENERAL

Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parents involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(2) DISCLOSURE OF EVALUATIONS AND RECOMMENDATIONS

(A) IN GENERAL

At least 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

(B) FAILURE TO DISCLOSE

A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(3) LIMITATION ON CONDUCT OF HEARING

A hearing conducted pursuant to paragraph (1) may not be conducted by an employee of the State educational agency or the local educational agency involved in the education or care of the child.

(g) APPEAL

If the hearing required by subsection (f) of this section is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency. Such agency shall conduct an impartial review of such decision. The officer conducting such review shall make an independent decision upon completion of such review.

(h) SAFEGUARDS

Any party to a hearing conducted pursuant to subsection (f) or (k) of this section, or an appeal conducted pursuant to subsection (g) of this section, shall be accorded

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of

section 1417(c) of this title (relating to the confidentiality of data, information, and records) and shall also be transmitted to the advisory panel established pursuant to section 1412(a)(21) of this title).

(i) ADMINISTRATIVE PROCEDURES

(1) IN GENERAL

(A) DECISION MADE IN HEARING

A decision made in a hearing conducted pursuant to subsection (f) or (k) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) of this section and paragraph (2) of this subsection.

(B) DECISION MADE AT APPEAL

A decision made under subsection (g) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) RIGHT TO BRING CIVIL ACTION

(A) IN GENERAL

Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(B) ADDITIONAL REQUIREMENTS

In any action brought under this paragraph, the court

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) JURISDICTION OF DISTRICT COURTS; ATTORNEYS' FEES

(A) IN GENERAL

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) AWARD OF ATTORNEYS' FEES

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party.

(C) DETERMINATION OF AMOUNT OF ATTORNEYS' FEES

Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) PROHIBITION OF ATTORNEYS' FEES AND RELATED COSTS FOR CERTAIN SERVICES

(i) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if—

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e) of this section that is conducted prior to the filing of a complaint under subsection (b)(6) or (k) of this section.

(E) EXCEPTION TO PROHIBITION ON ATTORNEYS' FEES AND RELATED COSTS

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) REDUCTION IN AMOUNT OF ATTORNEYS' FEES

Except as provided in subparagraph (G), whenever the court finds that—

(i) the parent, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the school district the appropriate information in the due process complaint in accordance with subsection (b)(7) of this section;

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) EXCEPTION TO REDUCTION IN AMOUNT OF ATTORNEYS' FEES

The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(j) MAINTENANCE OF CURRENT EDUCATIONAL PLACEMENT

Except as provided in subsection (k)(7) of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

* * * *

(l) RULE OF CONSTRUCTION

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 791 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

RESPONDENT'S BRIEF

No. 08-305

IN THE

Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT, PETITIONER

v.

T.A., RESPONDENT

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENT

MARY E. BROADHURST
MARY E. BROADHURST, P.C.
P.O. Box 11377
Eugene, OR 97440
(541) 683-8530

DAVID B. SALMONS
Counsel of Record
JASON R. SCHERR
GOUTAM PATNAIK
RANDALL M. LEVINE
MASAI MCDOUGALL
BINGHAM MCCUTCHEN, LLP
2020 K Street, N.W.
Washington, D.C. 20006
(202) 373-6000

Counsel for Respondent

QUESTION PRESENTED

Whether the Individuals with Disabilities Education Act permits an award of private-school tuition reimbursement as "appropriate relief" for a student with a disability who had been enrolled in public school but had not "previously received special education and related services under the authority of a public agency," 20 U.S.C. § 1412(a)(10)(C)(ii), when the reason the student had not previously received such services was that the school district wrongly determined that the student was ineligible for special education services and thus failed to make a free appropriate public education available to the student.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

A. Statutory Background 1

B. Factual Background 4

C. Decisions Below 10

SUMMARY OF ARGUMENT 13

ARGUMENT 16

I. IDEA'S PLAIN TERMS PERMIT TUITION REIMBURSEMENT WHERE A DISTRICT FAILS TO MAKE AVAILABLE A FREE APPROPRIATE PUBLIC EDUCATION 16

A. The Sweeping Negative Inference Petitioner Attempts To Read Into Subsection (C)(ii) Is Directly At Odds With The Plain Meaning of Subsection (C)(i) 17

B. Respondent's Construction Harmonizes And Gives Meaning To All Provisions Of The Act 21

1. Subsections (C)(ii) and (C)(iii) are fully consistent with the general rule of (C)(i) 21

2. Respondent's construction is consistent with the structure and purposes of IDEA 24

3. Respondent's construction is consistent with the legislative history 25

C. Petitioner's Asserted Negative Inference Is Insufficient To Divest Federal Courts Of Their Full Equitable Powers 27

D. At A Minimum, No Negative Inference From Subsection (C)(ii) Could Bar Reimbursement Where The District Wrongly Determines Eligibility 29

1. The text of subsections (C)(ii) and (C)(iii) presupposes eligibility has been determined properly 29

2. Petitioner is barred by fundamental principles of equity from using its erroneous eligibility determination as a ground for avoiding reimbursement 31

E. Petitioner's Reading Would Lead To Absurd Results And Create Perverse Incentives That Congress Did Not Intend 33

II. THE SECRETARY'S CONSTRUCTION OF THE 1997 AMENDMENTS IS ENTITLED TO DEFERENCE 39

III. PETITIONER'S RELIANCE ON THE SPENDING CLAUSE IS MISPLACED...41

CONCLUSION 46

TABLE OF AUTHORITIES

FEDERAL CASES

Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455 (2006) 43, 44, 45

Bennett v. Kentucky Dept. of Educ., 470 U.S. 656 (1985) 45

Board of Educ. of the City Sch. Dist. of City of New York v. Tom F., 128 S. Ct. 1, No. 06-637 (2007) 34

Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982) 2

Brown v. Swann, 35 U.S. 497 (1836) 28

Califano v. Yamasaki, 442 U.S. 682 (1979) 28

Carmel Cent. Sch. Dist. v. V.P. ex rel G.P., 373 F. Supp. 2d 402 (S.D.N.Y. 2005) 38

Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 39

Deweese v. Reinhard, 165 U.S. 386 (1897) 32

Diaz v. United States, 223 U.S. 442 (1912) 32

Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993) ..... *passim*

Frank G. v. Bd. of Educ. of Hyde Park Cent. Sch. Dist., 459 F.3d 356 (2d Cir. 2006) 11, 27

Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) 43

Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339 (2007) 41

Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960) 29

National Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007) 39

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) 41, 44

Porter v. Warner Holding Co., 328 U.S. 395 (1946) 27, 28

R.H. Stearns Co. v. United States, 291 U.S. 54 (1934) 32

Schaffer v. Weast, 546 U.S. 49 (2005) 36, 38

School Bd. of Nassau County, Fla. v. Arline, 80 U.S. 273 (1987) 44

School Comm. of Burlington, Mass. v. Dept. of Educ. of Mass., 471 U.S. 359 (1985) ..... *passim*

TRW Inc. v. Andrews, 534 U.S. 19 (2001) 19

United States v. Johnson, 529 U.S. 53 (2000) 19

United States v. Mead Corp., 533 U.S. 218 (2001) 41

United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001) 28

United States v. Peck, 102 U.S. 64 (1880) 32

United States v. United Foods, Inc., 533 U.S. 405 (2001) 42

Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973) 20

Whitman v. American Trucking Asss'ns, 531 U.S. 457 (2001) 41

Williams v. Taylor, 529 U.S. 420 (2000) 20

Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994 (2007) 10, 13, 42

FEDERAL CONSTITUTIONAL PROVISIONS

U.S. CONST. art. I, § 8, cl. 1 42

FEDERAL STATUTES, REGULATIONS & LEGISLATIVE HISTORY

20 U.S.C. § 1400(c) (1975) 24

20 U.S.C. § 1400(d)(1)(A) 1

20 U.S.C. § 1401(3)(A)(i) 2

20 U.S.C. § 1401(9) 2, 30

20 U.S.C. § 1401(9)(A) 42

20 U.S.C. § 1401(14) 2

20 U.S.C. § 1401(26) 2

20 U.S.C. § 1401(29) 2, 42

20 U.S.C. § 1406(a) (2006) 41

20 U.S.C. § 1412(a)(1)(A) 2

20 U.S.C. § 1412(a)(3) (1997) 24

20 U.S.C. § 1412(a)(3)(A) 2

20 U.S.C. § 1412(a)(10)(A)(ii) 2, 24

20 U.S.C. § 1412(a)(10)(C) 4, 12, 17, 20, 40

20 U.S.C. § 1412(a)(10)(C)(i) ..... *passim*

20 U.S.C. § 1412(a)(10)(C)(ii) ..... *passim*

20 U.S.C. § 1412(a)(10)(C)(iii) ..... *passim*

20 U.S.C. § 1413(a)(4) (1975) 24

20 U.S.C. § 1414(a) 18

20 U.S.C. § 1414(a)(1)(A) 2

20 U.S.C. § 1414(d) 2, 18

20 U.S.C. § 1415(b)(6) 3, 18, 36

20 U.S.C. § 1415(d)(2) 2

20 U.S.C. § 1415(f) 3

20 U.S.C. § 1415(g) 3

20 U.S.C. § 1415(i)(2)(C) 12, 39

20 U.S.C. § 1415(i)(2)(C)(iii) ..... *passim*

20 U.S.C. § 1415(i)(3)(D) 35

20 U.S.C. § 1415(i)(3)(F) 35

20 U.S.C. § 1417(b) 41

34 C.F.R. § 300.8 2

34 C.F.R. § 300.8(c)(9) 6

34 C.F.R. § 300.8(c)(9)(ii) 9

34 C.F.R. § 300.502(b)(1) 2

64 Fed. Reg. 12406 (Mar. 12, 1999) 39

65 Fed. Reg. 9178 (Feb. 23, 2000) 40

71 Fed. Reg. 46540 (Aug. 14, 2006) 40

143 CONG. REC. H2536 (daily ed. May 13, 1997) 26

143 CONG. REC. S4295-03 (1997) 25

H.R. Rep. No. 105-95 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 78 27

MISCELLANEOUS

8 CATHERINE M.A. MCCAULIFF, CORBIN ON CONTRACTS § 40.17 (1999) 33

13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 39:6 (2000) 33

STATEMENT OF THE CASE

This case arises out of the repeated efforts of T.A.'s parents to obtain special education services for their son, who was then in high school and had been enrolled in public schools since kindergarten. After petitioner twice wrongly determined that T.A. was ineligible for any services under the Individuals with Disabilities Education Act ("IDEA"), the parents sought reimbursement for private school tuition.

Petitioner asserts that because its erroneous eligibility determinations prevented T.A. from receiving any special education services from the public school, it is categorically immune from reimbursing T.A.'s parents for the costs of obtaining those services from a private facility. Under petitioner's theory, it does not matter how diligently and reasonably parents act in seeking services, or how egregiously school districts act in denying all special education services. In all cases, the district's violation of its statutory duties becomes the very source of its immunity from the statutory remedy of reimbursement, which this Court has repeatedly held is inherent in IDEA's essential guarantee of a *free* appropriate public education. Nothing in the text, history, or purposes of IDEA supports such a reading, and established principles of equity preclude it.

A. Statutory Background

Congress enacted IDEA to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). A free appropriate public education ("FAPE") is "special education and related services," provided at "public expense," tailored to "the unique needs" of

the child with a disability by means of an "individualized educational program" ("IEP"). 20 U.S.C. § 1401(9), (14), (26), (29); *see* 20 U.S.C. § 1414(d) (specifying IEP requirements); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181-82 (1982).

IDEA provides federal grants to states that submit plans to the Department of Education that implement the Act's policies and procedures, including the requirement to make a FAPE "available to all children with disabilities residing in the State." 20 U.S.C. § 1412(a)(1)(A). The Act contains a Child Find requirement that obligates school districts to ensure that "[a]ll children with disabilities residing in the State" are "identified, located, and evaluated." 20 U.S.C. §§ 1412(a)(3)(A) & 1412(a)(10)(A)(ii).

IDEA and its accompanying regulations define thirteen categories of disabilities, including "specific learning disabilities" and "other health impairments" ("OHI") (which includes attention deficit hyperactivity disorder ("ADHD")). 20 U.S.C. § 1401(3)(A)(i); *see* 34 C.F.R. § 300.8. To determine a child's eligibility under the Act, school districts "shall conduct a full and individual evaluation . . . before the initial provision of special education and related services to a child with a disability." 20 U.S.C. § 1414(a)(1)(A).

When a child is first evaluated, the parents must receive a notice of procedural safeguards, which "shall include a full explanation of the procedural safeguards . . . available under [the Act] and under regulations." 20 U.S.C. § 1415(d)(2); 34 C.F.R. § 300.502(b)(1). If parents disagree with an agency's decision regarding their child, they must be given an opportunity to present "a complaint with respect to

any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6). If the parties continue to disagree, the parents have a right to a due process hearing, which an aggrieved party may appeal. 20 U.S.C. §§ 1415(f), (g). In an action challenging the hearing officer's decision, the court "shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii).

In *Sch. Comm. of Burlington, Mass. v. Dept. of Educ. of Mass.*, 471 U.S. 359 (1985), and *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993), this Court held that the statutory authority to grant "appropriate" relief necessarily includes reimbursement for private special education services where the school district had not offered a child with a disability a FAPE, and the parents had enrolled the child in the private program without the school district's consent. Denying reimbursement, the Court concluded, would defeat IDEA's dual purpose of providing a child with a disability "both an appropriate education and a free one." *Burlington*, 471 U.S. at 372; *see Carter*, 510 U.S. at 15 (Districts "who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice.").

Congress reauthorized and amended IDEA in 1997. Among the additions were provisions specifically addressing the requirements for States in situations—such as *Burlington* and *Carter*—where a school district fails to provide a FAPE and a parent seeks reimbursement as "appropriate" relief. Section

1412(a)(10)(C)(i) provides the "general" rule governing "[p]ayment for education of children enrolled in private schools without consent of or referral by the public agency." 20 U.S.C. § 1412(a)(10)(C). It states that "this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility *if that agency made a free appropriate public education available to the child* and the parents elected to place the child in such private school or facility." 20 U.S.C. § 1412(a)(10)(C)(i) (emphasis added). The next subsection states that a court or hearing officer may require a state agency to reimburse parents for the cost of private school for a child with a disability, "who previously received special education and related services under the authority of a public agency," if "the court or hearing officer finds that the agency had not made a free appropriate public education available to the child." 20 U.S.C. § 1412(a)(10)(C)(ii). Subsection (C)(iii) provides factors that permit, but do not require, a court to reduce or deny the reimbursement described in clause (ii) if the parents failed to cooperate fully in the IEP process. *See* 20 U.S.C. § 1412(a)(10)(C)(iii).

B. Factual Background

The following facts are drawn largely from the decision of the hearing officer, whose factual findings were accepted by the lower courts. Pet. App. 44a.

T.A. attended public school in the district since kindergarten. His teachers repeatedly noted throughout the years that T.A. had trouble paying attention and completing his school work. Pet. App. 58a-59a, 60a-61a ¶¶ 1-2. T.A.'s difficulties increased when he entered Forest Grove High School ("FGHS")

in September 2000. *Id.* at 59a. By that time, Ms. A. was spending at least two hours with him daily, and as much as half a day on weekends, helping him complete homework and uncompleted classwork assignments. *Id.* at 61a-62a ¶ 5. His parents engaged in extensive contacts with their T.A.'s teachers to help him comprehend and keep track of his assignments at home. *Id.* at 64a-65a ¶¶ 12-14.

By December 2000, T.A. was behind in most of his classes. Ms. A. contacted the school counselor, Laurel Kaufman, who recommended that T.A. be evaluated for special education services, and T.A.'s parents agreed. Pet. App. 65a-66a ¶ 15. Notes from school district staff from a Multidisciplinary Team ("MDT") meeting related to T.A.'s evaluation held on January 16, 2001, include "Maybe ADD [attention deficit disorder] / ADHD [attention deficit hyperactivity disorder]?" *Id.* at 66a ¶ 16. MDT notes for February 13, 2001, reiterate school officials' suspicion that T.A. had ADHD. *Id.* at 67a ¶ 16.

In June 2001, the district found that T.A. did not have a "specific learning disability" and accordingly was ineligible for "special education in the area of learning disabled." Pet. App. 72a ¶ 26; J.A. 30. While T.A.'s parents agreed with the conclusion that T.A. did not meet the criteria for learning disabled, J.A. 30, they still desired individualized services for T.A., *see* J.A. 103. They were not informed of the school staff's suspicions that T.A. had ADHD, which would have provided grounds for eligibility under the OHI category. Pet. App. 3a; J.A. 96-97. The parents received a Notice of Procedural Safeguards sometime between December 31, 2000, and June 13, 2001. Pet. App. 76a ¶ 35. The Notice did not discuss substantive categories of disability, *see*

may have a learning disability and qualify for some special education in math." J.A. 103. She asked that those results be shared with other key faculty at the school, and stated: "We would like to see some individual attention such as tutoring." She also requested that certain of the educators meet "and develop some sort of plan for teaching [T.A.] in the areas the tests show he is low on." *Id.* She closed the request with this emphatic plea: "[T.A.] has been in the [public school district] since Kindergarten and still cannot do the most basic math functions. Surely there must be some method of teaching more appropriate for him. He is intelligent but apparently cannot process information or learn from the teaching methods used thus far." *Id.* at 104. The school did not respond. Pet. App. 74a ¶ 29.

T.A. began his sophomore year in September 2001. His first progress report in math showed that he was not turning in work and that he was failing tests. Pet. App. 77a ¶ 37. Ms. A. again contacted Mr. Martin, but he discouraged her, responding that T.A. could be referred for another evaluation (again, for a learning disability), "but it would be difficult to find him eligible." *Id.* at 77a-78a ¶ 37.

T.A.'s progress report in the fall of 2001 indicated that he was failing most of his classes. Because his mother was unable to provide all the help T.A. needed, his parents hired his older sister in November 2001 to tutor him 10 hours per week, while Ms. A. continued to assist T.A. Pet. App. 78a ¶ 38. Nonetheless, T.A.'s grades plummeted during his years at FGHS, dropping from a GPA of 2.00 at the end of 8th grade to a 1.38 at the end of the first semester of 11th grade. *Id.* at 63a ¶ 10. T.A.'s parents continued to seek help from the school. Again,

they contacted the school counselor, *id.* at 79a ¶ 40, and Ms. A. repeatedly communicated with her son's teachers and FGHS staff to discuss T.A.'s learning problems and to intervene to help T.A. keep up with his school work. *See, e.g., id.* at 80a ¶ 41, 135a & n.28, 153a. As the hearing officer found, T.A. advanced from grade to grade at FGHS only because of the extraordinary efforts of his parents and sister, who "provided him with what was in effect special education at home." *Id.* at 59a; *see also id.* at 135a, 137a-138a.

By fall/winter of 2002, during his junior year, T.A. was still lagging behind in his school work, had become very depressed, and had begun to use marijuana to alleviate his depression. Pet. App. 86a ¶ 53. T.A.'s therapist referred him to Dr. Michael Fulop, a clinical psychologist, for an evaluation for emotional and learning disorders, ADHD, and depression. *Id.* at 95a ¶¶ 73-74. Dr. Fulop evaluated T.A. in January and February 2003, and on March 14, 2003, he diagnosed T.A. with ADHD and a dysthymic disorder, a form of chronic depression. *Id.* at 96a-97a ¶¶ 74, 76. He also diagnosed him with various learning problems, poor organizational skills, difficulties with memory and expression, math disorder, and cannabis abuse. *Id.* at 98a-99a ¶ 77. Dr. Fulop recommended that T.A. attend Mount Bachelor Academy ("MBA") to address his ADHD, depression, and drug issues. *Id.* at 99a-100a ¶ 80. He also recommended that T.A.'s school consider him for special education services based on ADHD, among other disorders, and he proposed specific accommodations for T.A.'s education plan. *Id.* at 100a ¶ 81.

MBA is a residential school approved by the Oregon Department of Health and Human Services to

provide special education programs and services for children with disabilities. Pet. App. 105a-106a ¶ 90. T.A.'s parents followed Dr. Fulop's advice and enrolled their son there on March 24, 2003. *Id.* at 89a ¶ 58. They were not aware, before placing T.A. at MBA, that the district could be responsible for paying private school expenses. *Id.* at 89a-90a ¶ 61. On March 28, 2003, T.A.'s parents hired counsel, *id.*, and on April 18, 2003, requested a hearing seeking an order requiring the district to evaluate T.A. in all areas of suspected disability, including OHI. *Id.* at 113a ¶ 103.

The district again evaluated T.A. and, on July 7, 2003, again found him ineligible for special education services. Pet. App. 123a ¶ 124. While this time the MDT agreed that T.A. had ADHD, it determined that he did not qualify for special education because his disability had no adverse impact on his educational performance. *Id.* Specifically, district authorities focused on whether T.A.'s disability had a "very severe, significant impact" and concluded that the effect was "not severe enough." *Id.* At the eligibility meeting, one of the district's hired experts commented that IDEA was intended to serve only those students who had "tremendously significant disabilities." *Id.* Applicable regulations require only that ADHD or other health impairments "[a]dversly affects a child's educational performance." 34 C.F.R. § 300.8(c)(9)(ii).

Following the completion of the evaluation and eligibility process, the hearing was conducted in September and October 2003. Pet. App. 56a-57a. In January 2004, the hearing officer found that T.A. was a student with an OHI disability; that his

disability had an adverse impact on his educational performance; that T.A. needed special education services; and that in refusing to provide T.A. those services, the district had failed to offer him a FAPE. *Id.* at 59a, 129a; *see also id.* at 133a-138a. The hearing officer further found that MBA was an appropriate placement, *id.* at 150a, and that the three-week delay (from March to April 2003) before T.A.'s parents filed their hearing request was not unreasonable under the circumstances and provided sufficient notice to the district, *id.* at 149a. The hearing officer ordered the district to reimburse T.A.'s parents for their MBA expenses until the district offered T.A. a FAPE. *Id.* at 129a, 151a-154a. The hearing officer concluded that, with respect to T.A.'s ADHD, "FGHS had ample information about T.A.'s struggles in school due to his disability beginning with his first semester at FGHS and his initial evaluation in 2001." *Id.* at 152a. She also noted that the district had received considerable additional information since then about T.A.'s educational difficulties and the effort his family was investing to help him keep track of and complete his class requirements. The district's failure to evaluate T.A. adequately from 2001 to the present, the hearing officer determined, "militate[d] against [its] claim that reimbursement should be denied." *Id.* at 152a-153a.

C. Decisions Below

Petitioner filed an action in the U.S. District Court for the District of Oregon to review the hearing officer's decision.[1] The district court held that

---

[1] Petitioner sued only T.A. in this action, even though the hearing officer awarded reimbursement to T.A.'s parents. Pet. App. 158a; *see Winkelman v. Parma City Sch. Dist.*, 127 S. Ct.

20 U.S.C. § 1412(a)(10)(C)(ii) barred reimbursement because "[t]he plainest reading of the statute is that *only* children who had previously received special education services from the District are . . . eligible for . . . reimbursement." Pet. App. 48a-49a. Further, the court held, "[e]ven assuming that tuition reimbursement may be ordered in an extreme case" for a student not receiving special education services under 20 U.S.C. § 1415's general equitable principles, the facts here did not "support such an exercise of equity." *Id.* at 53a.

A divided panel of the court of appeals reversed. The court agreed with the Second Circuit's decision in *Frank G. v. Bd. of Educ. of Hyde Park Cent. Sch. Dist.*, 459 F.3d 356, 367-76 (2d Cir. 2006), *cert. denied*, 128 S. Ct. 436 (2007), that Section 1412(a)(10)(C)(ii)'s reference to students "'who previously received special education and related services' does not create a categorical bar to recovery of private school reimbursement for all other students." Pet. App. 13a. As the court of appeals observed, "the express purpose of the IDEA is 'to ensure that *all* children with disabilities have available to them a free appropriate public education.'" *Id.* at 15a (citations omitted). Interpreting the 1997 IDEA amendments to prohibit reimbursement to students who have not yet received special education and related services, the court reasoned, "runs contrary to this express purpose." *Id.*

1994, 2004-05 (2007). Although not raised below, its failure to sue the parents raises a question of Artile III standing; a victory in this case may not redress petitioner's injury from the order to reimburse the nonparty parents.

In amending IDEA in 1997, the court explained, Congress "chose to specify in § 1412(a)(10)(C) the requirements and factors to be considered by district courts and hearing officers when deciding whether to award reimbursement to students who previously received special education and related services." Pet. App. 16a. For students such as T.A. who were wrongly denied such services, the provisions of § 1412(a)(10)(C) "simply do not apply." Instead, reimbursement remains available "under principles of equity pursuant to § 1415(i)(2)(C)." *Id.*

The court of appeals likewise rejected the district court's alternative holding that under equitable principles, T.A.'s parents would not be entitled to tuition reimbursement even absent the alleged statutory bar. The court held that the district court had abused its discretion both in incorporating its erroneous statutory construction of Section 1412 into its equitable analysis, Pet. App. 17a-18a, and in applying the wrong legal standard under Section 1415's general equitable principles when it asserted that, at best, "tuition reimbursement may be ordered in an *extreme case* for a student not receiving special education services," *id.* at 18a. Accordingly, the court of appeals remanded for further proceedings, identifying several factors the district court should consider in determining whether to award tuition reimbursement. *Id.* at 18a-20a.

The proceedings on remand in the district court have been stayed pending this Court's decision in this case. J.A. 16 (2/2/2009 Order). In those proceedings, after six years of litigation, the school district still contends that T.A. is not eligible for any special education services under IDEA. *See*

Plaintiff-Appellant's Suppl. Brief at 2-5 (D. Or., No. 04-CV-331, filed Oct. 17, 2008).

SUMMARY OF ARGUMENT

Nothing in the 1997 Amendments to IDEA alters the Act's "central entitlement" of a "free appropriate public education" to *all* children with disabilities. *Winkelman*, 127 S. Ct. at 2004. Nor do the Amendments undermine Section 1415(i)(2)(C)(iii)'s authorization to courts to provide "appropriate" relief, including tuition reimbursement. To the contrary, the Amendments include a "general" rule governing payment of private educational expenses that reflects the very standard for reimbursement announced by this Court in *Sch. Comm. of Burlington, Mass. v. Dept. of Ed. of Mass.*, 471 U.S. 359 (1985), and *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993). That general rule creates the only express categorical limitation on tuition reimbursement by precluding reimbursement awards where the district "made a free appropriate public education available to the child." 20 U.S.C. § 1412(a)(10)(C)(i).

Petitioner largely ignores this express, but limited, prohibition on reimbursement and instead relies on language in the very next subsection, 1412(a)(10)(C)(ii), which *authorizes* tuition reimbursement to "the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, . . . if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner." Petitioner's entire argument is premised on reading into that permissive language a negative inference that Congress intended to bar *all* awards of tuition

reimbursement when the child has not previously received special education services from a public agency, even if the public agency by its own neglect or other wrongful conduct is solely responsible for the denial of such services.

That sweeping negative inference should be rejected because it is contrary to subsection's (C)(i)'s express "safe harbor" provision, which categorically bars tuition reimbursement only where the district has made a FAPE available to the child. Petitioner's reading therefore creates unnecessary tension between subsections (C)(i) and (C)(ii), and is otherwise inconsistent with the structure, purposes, and history of IDEA. It would also force an instrument of equity—reimbursement—into serving the most inequitable of ends, rewarding a district for its unlawful or wrongful acts. *See Burlington*, 471 U.S. at 372 (discussing equitable nature of reimbursement). Congress could not have intended such a result, and every principle of statutory construction confirms that it did not.

Such a reading, moreover, would create absurd results and perverse incentives for public school districts that Congress could not have intended. Under petitioner's construction, the very act of violating its statutory duties and denying T.A. all special education services becomes the source of immunity from any liability for reimbursing T.A.'s parents for the costs of obtaining private special education services. It is difficult to imagine a construction that is more inconsistent with the guarantees and purposes of IDEA, the entire premise of which is that school districts need incentives and accountability to protect against potential denials of a free appropriate education to children with disabilities. It is simply incon-

ceivable that Congress would create by mere inference a regime that actually rewards school officials for failing to comply with statutory duties.

At a minimum, both as a matter of statutory construction and of basic equity, petitioner's asserted negative inference, even if adopted, could not be applied to bar reimbursement where, as here, the school district has wrongly determined the child's eligibility for benefits under the Act and thereby improperly denied him access to *all* public special education services. The text of subsections (C)(ii) and (C)(iii) presupposes that a proper eligibility determination has been made, and longstanding principles of equity would preclude petitioner from claiming immunity based on an asserted statutory condition when its own violation of its statutory duties caused the failure of the condition.

Although petitioner's asserted reading should be rejected as a matter of statutory construction, if any ambiguity existed on the question, the Court should defer to the Department of Education's considered and consistent interpretation of the Act. In 1999 and 2006, the Department issued formal comments accompanying final regulations as part of its notice-and-comment rulemaking implementing IDEA. Those comments explained that the authority to award reimbursement under Section 1415's "appropriate" relief provision is "independent of" the authority to award reimbursement under Section 1412(a)(10)(C)(ii), and that reimbursement is therefore available in the circumstances presented here. That interpretation is entitled to deference.

Petitioner's extensive reliance on this Court's Spending Clause jurisprudence—an argument not raised below—is entirely misplaced. As this Court

held in *Burlington*, reimbursement is not damages but an equitable remedy inherent in the obligation to provide a *free* and appropriate public education. Accordingly, requiring reimbursement here does not implicate Spending Clause notice concerns. In any event, IDEA's language, the Department of Education's consistent formal interpretation, and this Court's precedents have provided recipients of IDEA funds ample notice of the availability of reimbursement in these circumstances.

ARGUMENT

I. IDEA'S PLAIN TERMS PERMIT TUITION REIMBURSEMENT WHERE A DISTRICT FAILS TO MAKE AVAILABLE A FREE APPROPRIATE PUBLIC EDUCATION

IDEA's fundamental guarantee of a free appropriate public education to every child with a disability has long been construed to include the right of parents to seek reimbursement for private school tuition where the school district has failed to make such a free and appropriate education available. Such reimbursement, this Court held in *Burlington*, is a necessary part of the "appropriate" relief available to courts under 20 U.S.C. § 1415(i)(2)(C)(iii), because denying reimbursement would defeat IDEA's dual purpose of providing children with disabilities "both an appropriate education and a free one." 471 U.S. at 372. Similarly, the Court in *Carter* made clear that under IDEA, "public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice." 510 U.S. at 15. But there is no escaping the obliga-

tion of providing a FAPE: "This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims." *Id.*

Contrary to petitioner's arguments, nothing in the 1997 Amendments to IDEA categorically bars tuition reimbursement to any class of children with disabilities that have been denied a FAPE.

A. The Sweeping Negative Inference Petitioner Attempts To Read Into Subsection (C)(ii) Is Directly At Odds With The Plain Meaning Of Subsection (C)(i)

All of petitioner's arguments rest on reading into the permissive language of subsection (C)(ii) a negative inference that Congress intended to bar *all* tuition reimbursement when the child has not previously received special education services from a public agency. According to petitioner, (C)(ii)'s alleged inference applies no matter how poorly the district performed its statutory duties, or how diligently and reasonably parents sought public special education services for their child.

Such a sweeping negative inference directly conflicts with the plain meaning of the prior paragraph—subsection (C)(i)—which, unlike subsection (C)(ii), creates an *express* safe-harbor provision for school districts. By its heading, that provision is the "general" rule governing "[p]ayment for education of children enrolled in private schools without consent of or referral by the public agency." 20 U.S.C. § 1412(a)(10)(C). It states that "this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility *if that agency made a free appropri-*

ate public education available to the child and the parents elected to place the child in such private school or facility." 20 U.S.C. § 1412(a)(10)(C)(i) (emphasis added). As petitioner concedes (Br. 20), that provision creates an express safe harbor for school districts, but *only* if they have "made a free appropriate public education available to the child."

Two important elements are required to make a FAPE available: first, the district must correctly evaluate and identify a child with a disability, 20 U.S.C. § 1414(a), and second, through the IEP process, it must develop an appropriate education program designed to meet the child's specific needs, *id.*, § 1414(d). Thus, subsection (C)(i) makes clear that a district can lose the benefit of its safe harbor either by failing to correctly identify a child with a qualifying disability (as in this case), or by failing to design an appropriate educational program for such a child. Either failure constitutes a failure to make "a free appropriate public education available to the child" within the meaning of (C)(i).[2]

Congress's inclusion of an *express*, but limited, safe-harbor provision in subsection (C)(i) precludes petitioner's attempt to create a different *implied* safe harbor under (C)(ii). Subsection's (C)(i)'s express prohibition on reimbursement awards is limited to where the district has made a FAPE available. If Congress had wanted to create an additional categorical bar on tuition reimbursement, it naturally would have done so expressly in this provision, not

---

[2] Failure at either the eligibility or IEP stage may be challenged through an administrative due process hearing and in court, 20 U.S.C. § 1415(b)(6), and the relief available is the same regardless of the claim. *See* p. 36 below.

by implication in a permissive grant of authority in subsection (C)(ii). *See TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."); *U.S. v. Johnson*, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.").

This is reflected in the structure of subsection (C)(i), which uses direct language and a simple logical rule: If a school district makes a FAPE available, then it is not required to pay for the cost of private school education. The logically equivalent contrapositive is that a school district is required to pay for the cost of private school education only when it fails to make a FAPE available. Subsection (C)(ii), in contrast, is considerably less direct. It states permissively that a court or hearing officer *may* award tuition reimbursement if the district failed to make a FAPE available and the child, who previously received special education services—appropriate or not—is later placed in private school without the consent of or referral by the school district. Whether the "previously received" language is intended to be conditional or descriptive is at best unclear, and fails to reflect (C)(i)'s simple and clear structure.

Consistent with those differences, subsection (C)(i) is designated the "general" rule governing payment of private school tuition. Nothing in the text or history of the 1997 Amendments suggests Congress intended (C)(ii) and (C)(iii) to create an ex-

ception to that rule. Thus, as explained in Part I.B. below, (C)(ii) and (C)(iii) are naturally read as governing particular applications of (C)(i)'s general rule.

Rather than attempting to harmonize the provisions, as established canons of construction require, petitioner posits a reading that creates substantial tension between the general rule announced in subsection (C)(i) and its particular application to the circumstances described in subsections (C)(ii) and (C)(iii). *See, e.g., Williams v. Taylor,* 529 U.S. 420, 434 (2000) (Kennedy, J.) (adopting statutory construction that "avoid[ed] . . . needless tension" between provisions); *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973) ("It is well established that our task in interpreting separate provisions of a single Act is to give the Act 'the most harmonious, comprehensive meaning possible'. . . .") (citations omitted). Thus, under petitioner's reading of subsection (C)(ii), a school district can effectively grant itself immunity from tuition reimbursement outside the terms of subsection (C)(i)'s express safe harbor, which is based on *compliance* with statutory duties, by wrongly denying a child all special education services. This contradiction renders petitioner's reading internally inconsistent, unworkable, and contrary to both the general rule in (C)(i) and IDEA's other essential requirements.

That is not to say that Section 1412(a)(10)(C) includes no limitations on reimbursement of private school tuition. Subparts (ii) and (iii) identify specific factors that may lead a court or hearing officer to limit or deny reimbursement on a case-by-case basis where parents fail to cooperate in the IEP process. *See* Part I.B. below. But the only categorical limitation on reimbursement is the express limitation of

subsection (C)(i) that reimbursement is unavailable where the district makes a FAPE available.

B. Respondent's Construction Harmonizes And Gives Meaning To All Provisions Of The Act

The substantial internal tensions created by petitioner's reading of the Act are particularly troubling because there is a readily available alternative reading of subsection (C)(ii) that is entirely consistent with the general rule announced in (C)(i) and harmonizes and gives meaning to every provision of the Act. That reading is far superior to petitioner's strained negative inference and should be adopted.

1. Subsections (C)(ii) and (C)(iii) are fully consistent with the general rule of (C)(i)

As explained, subsection (C)(i) provides the general rule governing payment of private school tuition and makes it available, subject to the district court's equitable discretion, in all cases except where the school district makes a FAPE available to the child with a disability. Subsections (C)(ii) and (C)(iii) together govern the particular application of that general rule in the specific context of particular concern to Congress—namely, where the parents and the special education faculty of the public school are already engaged in an ongoing, cooperative relationship concerning the individual educational needs of the child. By referring to children who had previously received special education services, Congress was identifying cases in which the district had properly identified a child with a disability and, working with the parents, had delivered some special education services to the child. Thus, the 1997 Amendments help ensure that where such an ongoing rela-

tionship exists—which had been the dominant fact pattern of the cases decided up to that time—school districts have every incentive to work closely with parents to provide appropriate special education services to the child in a timely manner, and parents have incentives to cooperate fully in the development and provision of those services, to timely share their concerns with public school officials, and to not prematurely halt the collaborative give-and-take between parents and special educators that is the hallmark of the Act's procedural protections.

Accordingly, subsection (C)(ii) has two primary purposes. First, it provides that even where the school district, working in conjunction with the parents, has properly identified the child as having a disability and has delivered special education services to the child through an IEP in the past, the district may still be liable for private tuition reimbursement if at any point it fails to make free, appropriate special education services available in a timely manner. Second, it identifies the class of cases—those with an ongoing, collaborative relationship between parents and public educators—that were of particular concern to Congress, and that would be governed by the specific limiting factors set forth in subsection (C)(iii). Those limiting factors, which all relate to whether parents have cooperated and acted reasonably with regard to the collaborative IEP process, expressly apply *only* to the cases covered by subsection (C)(ii). 20 U.S.C. § 1412(a)(10)(C)(iii).

Subsections (C)(ii) and (C)(iii) therefore encourage parents and school districts to work together to meet the needs of the child and to preserve existing collaborative relationships designed to achieve that

end. If the school district fails to timely respond to parents' legitimate concerns by providing appropriate services, the parents are authorized to recover private tuition reimbursement, even if the school district has correctly determined eligibility and has delivered special education services in the past. If parents short circuit the desired give-and-take of the IEP process by failing to timely share their concerns about the public school placement or their intent to remove the child from the public school, or otherwise act unreasonably, then they may have to bear part or all of the costs of the private school, even if the district's IEP is found wanting.

In all events, however, subsection (C)(ii)'s reference to children "who previously received special education services under authority of a public agency" exists as part of the permissive grant of authority to award tuition reimbursement in such cases and to define the category of cases to which the limiting factors contained in subsection (C)(iii) apply. In no circumstance does the phrase serve as a condition precedent to the ability to recover reimbursement or create a categorical exception to the general rule for the recoverability of private school tuition contained in subsection (C)(i). Where the school district wrongly determines eligibility and fails to make any special education services available to the child, subsection (C)(iii)'s limiting factors are irrelevant to the availability or amount of reimbursement. Reimbursement remains available subject to the equitable discretion of the court under the general rule announced in subsection (C)(i) and the equitable principles governing "appropriate" relief under Section 1415(i)(2)(C)(iii).

2. Respondent's construction is consistent with the structure and purposes of IDEA

Unlike petitioner's reading, respondent's construction is consistent with the structure and purposes of the Act as a whole. IDEA's primary purpose—to ensure that *all* children with disabilities receive a FAPE—remains unchanged since enactment of the predecessor statute, the Education for All Handicapped Children Act ("EAHCA"). 20 U.S.C. § 1400(c) (1975). IDEA achieves this goal by affirmatively obligating school districts in participating states to identify, locate, and evaluate *all* children with disabilities in the state. 20 U.S.C. § 1412(a)(3) (1997); *see* 20 U.S.C. § 1413(a)(4) (1975) (EAHCA's original "Child Find" requirement). This "Child Find" requirement is explicitly invoked in Section 1412(a)(10)(A)(ii) and reaffirmed as applicable to children in private schools. *See also* 20 U.S.C. § 1412(a)(10)(C)(i) (exempting funds owed under subsection (A) from its prohibition on liability).

Accordingly, school districts are required to find and evaluate children with disabilities enrolled in private schools and (if the parents request special education services from the public agency) prepare an IEP for those children. Yet, under petitioner's reading, districts could then deny such children an appropriate education (or as here, all special education services) with impunity, because the children had not previously received special education services. That makes no sense. This Court in *Burlington* looked at the essential components of the Act and concluded that where a school district fails to make available appropriate special education services, it would be inconsistent with the Act's general purposes to deny private school tuition reimburse-

ment. 471 U.S. at 370. IDEA's purposes would be even more poorly served by precluding reimbursement solely because the district denied the child all special education services. Nothing in the language, structure, or purposes of the Act contemplates a result so at odds with the central guarantee of a *free* appropriate education to all children.

In contrast, under respondent's reading of the Amendments, every provision has meaning and works together to fulfill IDEA's essential purpose.

3. Respondent's construction is consistent with the legislative history

Although the legislative history relating to the specific issue of tuition reimbursement is relatively sparse, what history exists supports respondent's reading of the statute. Senator Harkin's floor statement that "the bill *reiterates current policy* that a public agency is not required to pay for special education and related services at a private school *if that agency made a free appropriate education available to the child*" supports respondent's contention that where *no* FAPE is made available to the child because of an erroneous eligibility determination, tuition reimbursement is an available remedy. 143 CONG. REC. S4295-03, S4300 (1997) (emphasis added). So too do statements by Senator Jeffords expressing the common sense approach of the Amendments in giving educators "an opportunity *to offer* a free appropriate public education to a child with a disability, before the child's parents place the child in a private school and send the school district the bill[.]" *Id.* at 4296 (emphasis added).

Nothing in the legislative history supports petitioner's assertion that Congress intended to exclude

an entire class of children from receiving tuition reimbursement because the school has made an erroneous eligibility determination. Nor is there any indication that Congress intended to completely divest the courts of their traditional authority to apply standard principles of equity in providing tuition reimbursement to such students.

Petitioner points to two pieces of legislative history it claims supports the negative inference it reads into Section 1412(a)(10)(C)(ii). Neither does.

The first is a statement by Representative Castle to the effect that the pre-Amendment statute had the "unintended . . . consequence" of "school districts unnecessarily paying expensive private school tuition," and that the proposed Amendment "makes it harder for parents to unilaterally place a child in elite private schools at public taxpayer expense, lowering costs to local school districts." 143 CONG. REC. H2536 (daily ed. May 13, 1997). Nothing in that statement, however, suggests that parents who are wrongly denied all special education services under the Act (or even those who are denied appropriate services in an IEP but whose child had not previously received benefits) are barred from obtaining tuition reimbursement. Rather, the statement more likely refers to the limiting factors added in subsection (C)(iii) providing that reimbursement may be reduced or denied where parents fail to cooperate and act reasonably with regard to the IEP process.

The second piece of legislative history on which petitioner relies is a passage from a House Report. The report first describes the impact of the new Section 612 (§ 1412), which it states "specifies that parents may be reimbursed for the cost of a private educational placement under certain conditions (i.e.,

when a due process hearing officer or judge determines that a public agency had not made a [FAPE] available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency's consent)." H.R. REP. NO. 105-95, at 93 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 78, 90. That statement is perfectly consistent with respondent's view of the Amendments and suggests that districts can guarantee against reimbursement liability only by providing a FAPE. The next sentence adds: "Previously, the child must have had received special education and related services under the authority of a public agency." *Id.* That statement is far from clear, but its use of "[p]reviously" at the beginning of the sentence following a description of the Amendments is most naturally read as a reference (albeit a misguided one) to the state of the law previous to those Amendments. While this Court's decisions up to that time did not limit reimbursement to situations in which a child had previously received special education services from a public agency, they all involved that fact pattern. In any event, as the Second Circuit has noted, the Report's "awkward paraphrase . . . does not expressly exclude reimbursement where special education and related services have not been previously provided." *Frank G.*, 459 F. 3d at 373.

C. Petitioner's Asserted Negative Inference Is Insufficient To Divest Federal Courts Of Their Full Equitable Powers

The Court should reject petitioner's proposed negative inference for the additional reason that it conflicts with the rule requiring clear congressional intent to significantly limit the equitable powers of

federal courts. This Court has long held that federal jurisdiction confers on the federal court "*all* the inherent equitable powers . . . available for the proper and *complete* exercise of that jurisdiction," and that the "comprehensiveness" of the court's equitable authority can be limited only by a "clear" legislative command. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (emphases added); *see U.S. v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001) (Only a "clear and valid legislative command" can divest a federal court of equity authority.) (quotations omitted); *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) ("Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction.").

As *Porter* makes clear, a mere negative inference from an otherwise permissive list of equitable powers is not sufficient to limit the broad inherent equitable powers of the court. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Porter*, 328 U.S. at 398 (quoting *Brown v. Swann*, 35 U.S. 497, 503 (1836)). Thus, in *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 295-296 (1960), the Court held that as part of their general equitable powers under the Fair Labor Standards Act, courts may order reimbursement for lost wages caused by unlawful discrimination. *Id.* at 291-92 ("When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light of statutory purposes."). The presence of a statutory amendment removing courts' authority to award "unpaid minimum wages" to remedy violations of the

minimum wage and overtime provisions of the statute did not change this result. *Id.* at 294-95. There was "no warrant," the Court held, for construing the amendment as "a general repudiation of equitable jurisdiction to order reimbursement to effectuate the policies of the Act." *Id.* at 295-96.

The negative inference petitioner urges cannot satisfy the clear statement required by *Porter*, *Mitchell*, and their progeny. This is particularly true given that, as discussed, Congress's inclusion of an *express* prohibition on reimbursement in subsection (C)(i) is strong evidence it intended no negative inference from (C)(ii)'s permissive language.

D. At A Minimum, No Negative Inference From Subsection (C)(ii) Could Bar Reimbursement Where The District Wrongly Determines Eligibility

Even if subsection (C)(ii) were read to include a negative inference limiting tuition reimbursement, it cannot be read to bar reimbursement where, as here, the school district has wrongly determined the child's eligibility and thereby improperly denied the child *all* special education and related services. That follows both from the statutory text and elemental principles of equity.

1. The text of subsections (C)(ii) and (C)(iii) presupposes eligibility has been determined properly

All of subsection (C)(ii)'s relevant terms presuppose that a school district has identified a child with a disability. That includes its references to a child with a disability having "previously received special education and related services under authority of a public agency"; the placement of that child in private

school without "the consent of or referral by the public agency"; and the failure to make a FAPE available to the child. None of those elements is even relevant until a child has been determined to have a disability qualifying him for benefits under the Act. Absent such a determination of disability, the child cannot receive any special education services, the district cannot consent to or refer the child for a private-school placement under the Act, and the district is under no obligation to provide a FAPE, which is itself defined as special education and related services provided "in conformity with the [IEP]." 20 U.S.C. § 1401(9).

Similarly, subsection (C)(iii)'s limiting factors, which Congress provided should govern reimbursement awarded under subsection (C)(ii), *all* relate to how well the parents cooperated with the IEP process—a process that only applies *after* the child has been determined by the public agency to have a disability. *See* 20 U.S.C. § 1412(a)(10)(C)(iii)(I)-(III). Because there can be no IEP under the Act until a child has been determined to have a qualifying disability, Congress's focus on the parents' actions during the IEP process as the sole ground for limiting or denying reimbursement demonstrates that it did not intend (C)(iii) to govern a district's erroneous determination that a child is ineligible for benefits.

Rather, Congress left wrongful eligibility determinations to be governed by the "general" rule for payment of private school tuition in subsection (C)(i) and the court's discretion to provide "appropriate" relief under Section 1415(i)(2)(C)(iii). Awards of reimbursement in such cases are more straightforward, since there is no need to compare the details of the district's proposed services with those requested

by the parents, and the ongoing, collaborative relationship that is the hallmark of the Act has yet to be formally established. Accordingly, Congress saw no need to articulate specific factors to govern reimbursement awards in eligibility disputes, as it did with the cases governed by subsection (C)(ii).

In all events therefore, subsection (C)(ii) cannot be read to limit reimbursement where the district has wrongly determined eligibility. Congress's concern over preserving the cooperative relationship between parents and school officials reflected in the IEP process is simply inapplicable where, as here, the school district erroneously denied all special education services to the child.

2. Petitioner is barred by fundamental principles of equity from using its erroneous eligibility determination as a ground for avoiding reimbursement

Petitioner's attempt to benefit from its erroneous eligibility determination is independently barred by settled principles of equity.

This Court made clear in *Burlington* that tuition reimbursement is not damages, but an equitable remedy that "merely requires the [district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." 471 U.S. at 370-71. Because reimbursement is a creature of equity, traditional "equitable considerations are relevant in fashioning relief." *Id.* at 374. Nothing in the 1997 Amendments alters the equitable nature of the reimbursement remedy, and the limiting factors Congress established in Section 1412(a)(10)(C)(iii) are fully consistent with traditional equitable considerations.

Despite these equitable underpinnings, petitioner seeks federal court relief from the hearing officer's award of reimbursement by asserting that the very act of violating its statutory duties in evaluating T.A. grants it immunity from the statutory remedy. That reading violates the fundamental tenet of equity jurisprudence that a party shall not be permitted to benefit from its own misconduct. *See, e.g.*, *Diaz v. U.S.*, 223 U.S. 442, 458 (1912) ("Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong."); *Deweese v. Reinhard*, 165 U.S. 386, 390 (1897) ("A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses . . . he will be held remediless in a court of equity."). Such inequity is further confirmation (if any were needed) that Congress did not intend to categorically prohibit reimbursement by subsection (C)(ii)'s permissive language.

Nevertheless, even if prior receipt of special education services were somehow read as a condition precedent to an award of reimbursement, under established principles of equity unaffected by the 1997 Amendments, petitioner's erroneous denial of all special education services would preclude it from relying on that condition as a basis for avoiding reimbursement. *See, e.g.*, *R.H. Stearns Co. v. U.S.*, 291 U.S. 54, 61 (1934) (Cardozo, J.) (construing limitations period of Revenue Act of 1928 in light of "fundamental and unquestionable" principle that "[h]e who prevents a thing from being done may not avail himself of the nonperformance which he has himself occasioned") (citations omitted); *U.S. v. Peck*, 102 U.S. 64, 65 (1880) ("It is a sound principle that he who prevents a thing being done shall not avail him-

self of the non-performance he has occasioned."); 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 39:6, at 528-29 (2000) ("It is a principle of fundamental justice that if a promisor is personally the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, the promisor cannot take advantage of the failure."); 8 CATHERINE M.A. MCCAULIFF, CORBIN ON CONTRACTS § 40.17, at 580-81 (1999) ("One who unjustly prevents the performance or the happening of a condition . . . thereby eliminates it as a condition. Thus the party cannot escape liability by preventing the happening of the condition . . . .").

Equity simply does not allow petitioner to come to court and claim immunity based on an asserted statutory condition that the child must have previously received special education services from a public agency when its own violation of its statutory duties caused the child's asserted failure of the condition. Any other result would be grossly inequitable, and petitioner can point to no evidence that Congress intended such a result.

E. Petitioner's Reading Would Lead To Absurd Results And Create Perverse Incentives That Congress Did Not Intend

This Court has twice held that reimbursement of private school tuition is essential to enforcing IDEA's requirement that all children with disabilities be provided an education that is both free and appropriate, and that IDEA "should not be interpreted to defeat [that] objective[]." *Burlington*, 471 U.S. at 372; *see Carter*, 510 U.S. at 12-13. Yet, under petitioner's approach, the parents of a child with a disability who has wrongly been denied all special education services are barred from recovering the costs

of private special education services, even where they have acted diligently and reasonably to obtain those services from the public school.

Petitioner's reasoning is far more extreme, and the results far more absurd, than those presented to the Court last Term in *Bd. of Educ. of the City Sch. Dist. of City of New York v. Tom F.*, 128 S. Ct. 1, No. 06-637 (2007). The child in *Tom F.* had been properly determined to have a qualifying disability and the sole dispute was over the appropriateness of the services contained in the proposed IEP. The district argued that Congress's goal in enacting Section 1412(a)(10)(C)(ii) was to require the parents to give the proposed public placement a try before enrolling the child in private school. *See* 06-637 Pet. Br. 22, 37; 06-637 Argument Tr. 15-17. Under that approach, parents would not be denied all opportunities for seeking reimbursement, but they would be required to place the child for some relatively brief period of time in the public placement before moving him to the private school and seeking reimbursement.[3]

Here, in contrast, T.A. was in the public school system until his junior year in high school. Despite his parents' repeated attempts to obtain individualized services, T.A. was denied all access to special education services from the public agency by petitioner's failure to evaluate him under all the categories of suspected disabilities and its erroneous conclusion that his disability is not sufficiently serious

---

[3] Respondent disagrees with the arguments of the *Tom F.* petitioner for the reasons explained herein. But it is notable nonetheless how much further petitioner must go in this case in order to prevail.

to warrant services. Unlike the parents in *Tom F.*, who at least had the option of agreeing to the IEP's placement and receiving some (if not entirely appropriate) special education services, T.A.'s parents could do nothing to obtain special education services from the public agency in a timely manner.

The essence of petitioner's argument is that by wrongly denying T.A. *all* rather than merely some special education services, the district effectively granted itself immunity from paying tuition reimbursement. The only rationale the district posits for such a troubling result is that Congress wanted to reduce costs for public school districts. Pet. Br. 29, 40. But to posit, as petitioner does, that Congress wanted to achieve its asserted cost-cutting by denying any effective relief to children with disabilities who suffer the worst form of denial under the Act—not merely a denial of an appropriate level of special education services, but of *all* special education services—is both absurd and creates genuinely perverse incentives.[4]

Under petitioner's view, Congress has categorically foreclosed any opportunity for tuition reimbursement no matter how egregious the school district's wrongful denial of eligibility may be. While it is true, as petitioner asserts, that Congress generally presumes that public officials "properly perform" their duties, Pet. Br. 39-40 (citing, *inter alia*,

---

[4] That is not to say Congress was unconcerned with costs. In addition to the factors limiting reimbursement in Section 1412(a)(10)(C)(iii), Congress added provisions to deter excessive litigation by parents and to encourage reasonable settlements. *See* 20 U.S.C. §§ 1415(i)(3)(D), (F). But it did not single out children with disabilities who had wrongly been denied all special education services as a source for cost savings.

Schaffer v. Weast, 546 U.S. 49, 62-63 (2005) (Stevens, J., concurring)), that presumption does not amount to blind faith. As IDEA and its numerous protections attest, Congress knows that school officials are not perfect, and that by mistake, neglect, or more serious wrongdoing, school districts are capable of denying children with disabilities the free appropriate education guaranteed by the Act. The entire premise of IDEA is that school districts need incentives and accountability to protect against such denials of FAPE. It is simply inconceivable that Congress would create—by mere inference—a regime that actually rewards school officials for failing to comply with statutory duties.

It is no answer to assert, as petitioner does (Br. 38-40), that parents who have been wrongly denied all special education services for their child still have the procedural protections of the Act to vindicate their rights. The procedural protections to which petitioner refers, including the "tight deadlines" for due process hearings, apply to all disputes under the act, including claims that an IEP does not provide appropriate special education services. *See* 20 U.S.C. § 1415(b)(6) (guaranteeing parents "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child"). Yet, Congress was not satisfied to rely solely on procedural protections and instead provided tuition reimbursement when the dispute is the more limited one concerning the appropriate level of special education services in an IEP. It thus makes no sense to assert that Congress intended to rely *solely* on those same procedural protections when the denial is the more egregious one of *all* special education services.

Moreover, petitioner's assertion (Br. 38-39) that it is "far-fetched" and "highly unlikely" that "a child [could be] forced to languish for years in some sort of limbo" as the district and his parents litigate over his eligibility for benefits is truly stunning given the facts of this case. T.A.'s parents initiated the due process hearing to challenge the district's erroneous eligibility determination in 2003—*six years ago*. To this day, petitioner is still challenging the hearing officer's determination that T.A. is a child with a disability entitled to benefits under the Act. After six years of litigation, its position in the district court remains that T.A. is not sufficiently disabled and therefore is not entitled to special education and related services. *See* Plaintiff-Appellant's Suppl. Brief at 2-5 (D. Or., No. 04-CV-331, filed Oct. 17, 2008). Under petitioner's reading of the Act, a child with a disability could be denied all access to free special education services for the entire period of protracted litigation over eligibility, and the parents would still be denied tuition reimbursement when they finally prevailed on the eligibility issue.

Petitioner suggests (Br. 39 n.3) that parents in such circumstances need not worry because Congress has provided that children who ultimately prevail after years of litigation "may seek to recover 'compensatory education' to allow the child to continue in public education beyond the age of twenty-one to make up for the earlier deprivation." That is cold comfort. Its obvious inadequacy (as well as the inadequacy of relying solely on time-consuming procedural protections) is precisely why this Court and Congress determined that tuition reimbursement is a vital and appropriate element of relief available to parents whose child has been denied a free appropriate public education.

Also baffling is petitioner's complaint (Br. 40) that permitting tuition reimbursement where a district has wrongly denied a child all special education services would somehow "create a perverse incentive for parents to preemptively enroll a child in private school, without engaging the district regarding whether and, if so, what type of special education would be available for their child." Parents who unilaterally place their children in private school "do so at their own financial risk," *Carter*, 510 U.S. at 15 (quoting *Burlington*, 471 U.S. at 373-4), and they bear the burden of proving that the school district failed to make a free appropriate education available to their child, *Schaffer*, 546 U.S. at 51. The reimbursement remedy only becomes an issue once parents have satisfied that substantial burden. Moreover, parents' failure to cooperate with public school officials, or to otherwise act unreasonably or in bad faith, may lead to a reduction or denial of reimbursement under Section 1415's general equitable principles. *See Carter*, 510 U.S. at 15-16; *see also, e.g., Carmel Cent. Sch. Dist. v. V.P. ex rel G.P.*, 373 F. Supp. 2d 402, 416 (S.D.N.Y. 2005) (rejecting claim for tuition reimbursement where parents "never had the slightest intention of allowing the child to be educated in the public school, and did everything possible . . . [to] frustrate a timely review of [her] condition").

Here, T.A.'s parents acted reasonably and in good faith at each stage of the proceedings. Unlike the parents in *Tom F.*, no one could question their sincerity in seeking special education benefits from the public school. T.A. attended public school through his junior year in high school. And, as the hearing officer found, the parents acted diligently and reasonably in trying to obtain special education

services from the district. Pet. App. 152a-153a. Moreover, any faults petitioner may assert regarding the parents' conduct can be considered on remand as part of the district court's equitable discretion to determine whether reimbursement is appropriate, and if so how much to award under the general equitable principles of Section 1415.

II. THE SECRETARY'S CONSTRUCTION OF THE 1997 AMENDMENTS IS ENTITLED TO DEFERENCE

For all the reasons discussed above, IDEA authorizes tuition reimbursement in the context of this case. If the Court had any doubt as to that conclusion, however, it should defer to the Secretary of Education's considered interpretation of the Amendments at issue. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2531-33 (2007); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

The Department of Education ("DOE") explicitly addressed the question presented in commentary published in the Federal Register that accompanied the agency's final regulations implementing the 1997 Amendments. DOE stated that "hearing officers and courts retain their authority recognized in *Burlington* and . . . *Carter*" under § 1415(i)(2)(C)(iii) "to award 'appropriate' relief" in the form of private tuition reimbursement if a public agency has failed to offer a FAPE to a child with a disability in instances in which the child has not yet received special education and related services. 64 Fed. Reg. 12406, 12602 (Mar. 12, 1999). DOE explained that this authority to award reimbursement under Section 1415(i)(2)(C) "is independent of their authority under section

612(a)(10)(C)(ii) [20 U.S.C. § 1412(a)(10)(C)(ii)] to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency." *Id.* Thus, as early as 1999, the agency tasked with implementing IDEA expressly construed the 1997 Amendments as preserving the availability of reimbursement where a child, such as T.A., has been denied special education and related services.

DOE has consistently maintained that position. It reiterated that view in a published letter stating that "[w]e do not view 612(a)(10)(C) [20 U.S.C. § 1412(a)(10)(C)] as foreclosing categorically an award of reimbursement in a case in which a child has not yet enrolled in special education and related services under the authority of a public agency." Letter from DOE to Susan Luger, listed in 65 Fed. Reg. 9178 (Feb. 23, 2000) and quoted in *Application of a Child with a Disability*, Appeal No. 06-021 (Apr. 25, 2006), *available at* http://www.sro.nysed.gov/2006/06-021.htm. DOE also reaffirmed its statutory construction in 2006 in formal comments that were published, following notice-and-comment rulemaking, with the agency's final regulation implementing the 2004 IDEA amendments. 71 Fed. Reg. 46540, 46599 (Aug. 14, 2006). There, the Secretary expressly rejected proposed regulatory language that would have relieved a public agency of its obligation to provide tuition reimbursement if the child had not previously received special education services under the authority of a public agency, stating that the authority to award tuition reimbursement in such cases "is independent of the court's or hearing officer's authority under" Section 1412(a)(10)(C)(ii).

Those statements reflect the considered view of the agency with authority to construe and enforce the Act and are the product of "relatively formal administrative procedure[s] tending to foster . . . fairness and deliberation." *U.S. v. Mead Corp.*, 533 U.S. 218, 230 (2001); *see Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2349 (2007) (deferring to agency interpretation of its regulations contained in an "Advisory Memorandum," because it "reflect[ed] [the agency's] considered views"); *Whitman v. Am. Trucking Asss'ns*, 531 U.S. 457, 477-482 (2001) (applying *Chevron* to agency statements in explanatory preamble to regulations). Contrary to petitioner's unsupported assertion (Br. 34-35), DOE's statements were made in connection with the Secretary's authority to issue regulations "necessary to ensure that there is compliance with the specific requirements of" IDEA. 20 U.S.C. § 1417(b), *recodified at* 20 U.S.C. § 1406(a) (2006). DOE authoritatively construed the requirements of the Act with regard to tuition reimbursement, and, as explained above, its construction is entirely consistent with the terms of the 1997 Amendments. Accordingly, its considered construction is entitled to deference.

III. PETITIONER'S RELIANCE ON THE SPENDING CLAUSE IS MISPLACED

Petitioner contends (Br. 18-19) for the first time in this Court that it cannot be ordered to reimburse respondent because IDEA was enacted pursuant to Congress's spending authority and it lacked sufficient notice under *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981), that it could be liable for reimbursement under the circumstances of this case at the time it accepted funds under the Act. Because petitioner failed to argue spending author-

ity principles below, the Court should decline to consider that argument in the first instance. *U.S. v. United Foods, Inc.*, 533 U.S. 405, 417 (2001).

In any event, petitioner's new-found interest in the Spending Clause (U.S. CONST. art. I, § 8, cl. 1) is misplaced.

First, the remedy of reimbursement is not damages, but "merely requires the [district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP," *Burlington*, 471 U.S. at 370-71. It is therefore inherent in IDEA's core obligation to provide a *free* appropriate public education, which is expressly defined to require districts to provide appropriate special education services "at public expense," 20 U.S.C. § 1401(9)(A), and "at no cost to parents," 20 U.S.C. § 1401(29). Because liability for reimbursement is bound up in IDEA's essential guarantee, Spending Clause notice concerns are not implicated. As with the right of parents to initiate litigation at issue in *Winkelman*, tuition reimbursement "does not impose any substantive condition or obligation on States they would not otherwise be required by law to observe." 127 S. Ct. at 2006.

Second, school districts such as petitioner had clear notice of their potential liability for tuition reimbursement if they failed to provide a free appropriate public education to a child with a disability. As explained, IDEA itself provides such notice. The obligation to provide a FAPE has never changed, nor has the courts' authority to provide "appropriate" relief under Section 1415(i)(2)(C)(iii). Instead, the 1997 Amendments added Section 1412(a)(10)(C)(i), which—consistent with this Court's prior decisions in *Burlington* and *Carter*—creates an *express* prohi-

bition on awards of tuition reimbursement limited solely to where the district has made a FAPE available to the child. Nothing in the permissive language authorizing reimbursement in the cases covered by subsection (C)(ii) and (C)(iii) undermines the clear notice of potential liability provided by (C)(i). *See* Part I.A. above.

Moreover, even apart from the clear statutory notice, states were clearly informed by DOE that the 1997 Amendments did not alter the state's obligation to provide tuition reimbursement in appropriate cases where a FAPE has been denied. As explained above, DOE explicitly addressed the question in 1999 in commentary published in the Federal Register, and it has repeatedly and consistently maintained that position since then.

In assessing whether states have "clear notice," this Court has looked not just to the language in the statute, but also to statements of the agency charged with administering the statute, as well as the interpretations provided in prior case law. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2463 (2006). Thus, in *Jackson*, this Court concluded that grant recipients were on notice of obligations based in part on administrative regulations promulgated by the DOE in the Title IX context. 544 U.S. at 183-184. Similarly, in *Arlington*, in ruling that IDEA did not provide for the recovery of costs for experts or consultants, the Court implicitly confirmed that the appropriate executive branch agency's statements could provide the required notice. In that case, the Court concluded that a statement by the Government Accountability Office was not relevant to the "clear notice" analysis, in part be-

cause it was made "by an agency not responsible for implementing the IDEA." *Arlington*, 126 S. Ct. at 2463 n.3. In contrast, DOE explicitly resolved the question at issue against petitioner's position long before petitioner accepted funds for the school years at issue. And *Pennhurst* itself acknowledges the value of such clear regulatory statements. *See* 451 U.S. at 23-24 ("Equally telling is the fact that the Secretary has specifically rejected the position of the Solicitor General."); *see also Sch. Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 286 n.15 (1987) ("It is evident, however, that our holding is premised on the plain language of the Act, and on the detailed regulations that implement it.").

Thus, DOE's explicit and repeated position that states are not categorically immune from tuition reimbursement unless they have made a free appropriate public education available to the child provides clear and independent notice that defeats any reliance on the Spending Clause in this case. While petitioner may (and does) complain that DOE's position is flawed and therefore not entitled to deference—an argument that fails for the reasons described above—it cannot plausibly assert that it was unaware that DOE claimed to have authoritatively resolved the issue against petitioner's position. Accordingly, when petitioner elected to receive funds under IDEA, it did so with notice of its potential liability. That is all the Spending Clause requires.

This Court's decisions in *Burlington* and *Carter* further confirm that petitioner had ample notice of its potential liability. They also demonstrate why petitioner's substantial reliance on this Court's decision in *Murphy* is misplaced. Under *Burlington* and *Carter*, the law was settled that tuition reimburse-

ment was potentially available in all cases where the school district failed to provide a free appropriate public education. As explained, the 1997 Amendments were enacted against that background and codify a "general" rule in Section 1412(a)(10)(C)(i) that mirrors those holdings.

In contrast, the settled background rule against which the Court in *Murphy* considered whether expert fees were recoverable to a prevailing parent under the Act was that such fees were unavailable absent clear statutory language to the contrary. 126 S. Ct. at 2459-60. Because the legal framework behind the 1997 Amendments made clear that tuition reimbursement in the context of this case was available, *Murphy* is inapposite.

In sum, the States have had clear notice that IDEA imposes the substantive obligation to provide a free appropriate public education to all children with disabilities, including the duty to reimburse parents when the child has been denied all access to special education services from the public school. If petitioner had any doubts, it should have sought clarification from DOE before receiving IDEA funds. *See Bennett v. Kentucky Dept. of Educ.*, 470 U.S. 656, 672 (1985) ("[I]f the State was uncertain on this point, it could have sought clarification from the Office of Education."). But it cannot now complain that it was somehow unaware of its potential liability for reimbursement if it wrongly denied all special education services to a child.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

MARY E. BROADHURST
MARY E. BROADHURST, P.C.
P.O. Box 11377
Eugene, OR 97440
(541) 683-8530

DAVID B. SALMONS
Counsel of Record
JASON R. SCHERR
GOUTAM PATNAIK
RANDALL M. LEVINE
MASAI MCDOUGALL
BINGHAM MCCUTCHEN, LLP
2020 K Street, N.W.
Washington, D.C. 20006
(202) 373-6000

Counsel for Respondent

March 25, 2009

REPLY BRIEF

No. 08-305

IN THE

Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,
Petitioner,

v.

T.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

EAMON P. JOYCE
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300

GARY FEINERMAN*
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

RYAN C. MORRIS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

RICHARD COHN-LEE
ANDREA L. HUNGERFORD
THE HUNGERFORD LAW FIRM, LLP
P.O. Box 3010
Oregon City, OR 97045
(503) 650-7990

Counsel for Petitioner

*Counsel of Record

April 21, 2009

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
I. THE SPENDING CLAUSE CLEAR NOTICE RULE GOVERNS HERE	1
II. IDEA DOES NOT PROVIDE CLEAR NOTICE OF A TUITION REIMBURSEMENT OBLIGATION TO STUDENTS LIKE T.A.	5
A. The 1997 Amendments Unambiguously Preclude Tuition Reimbursement To Students Like T.A.	5
B. At Most, IDEA Fails To Impose Any Unambiguous Tuition Reimbursement Obligation Under These Circumstances	10
C. *Burlington* and *Carter* Do Not Provide Clear Notice	11
D. The Department's Commentary Does Not Provide Clear Notice, And Is Not Entitled To Deference In Any Event	13
E. The Legislative History Does Not Provide Clear Notice	18
F. T.A.'s Interpretation Of IDEA Would Create, Not Prevent, Perverse Results	21
CONCLUSION	28

TABLE OF AUTHORITIES

CASES Page

Arlington Cent. Sch. Dist. Bd. of Educ. v. *Murphy*, 548 U.S. 291 (2006) 2, 4, 13, 18
Bd. of Educ. v. *Rowley*, 458 U.S. 176 (1982) 13, 18
Corley v. *United States*, 556 U.S. __, 2009 WL 901513 (Apr. 6, 2009) 9
Dellmuth v. *Muth*, 491 U.S. 223 (1989) 18
Doe ex rel. Doe v. *Bd. of Educ.*, 9 F.3d 455 (6th Cir. 1993) 3
In re Educ. of T.A., No. DP 04-108 (Or. Superintendent of Pub. Educ. May 7, 2004) 25
EEOC v. *Arabian Am. Oil Co.*, 499 U.S. 244 (1991), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 251 (1994) 19
Florence County Sch. Dist. Four v. *Carter*, 510 U.S. 7 (1993) 12
Frank G. v. *Bd. of Educ.*, 459 F.3d 356 (2d Cir. 2006), *cert. denied*, 128 S. Ct. 436 (2007) 11
Franklin v. *Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992) 1
Garcia v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) 14
Geier v. *Am. Honda Motor Co.*, 529 U.S. 861 (2000) 14
Gomez-Perez v. *Potter*, 128 S. Ct. 1931 (2008) 15
Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 10
Hilton v. *S.C. Pub. Rys. Comm'n*, 502 U.S. 197 (1991) 13, 18

TABLE OF AUTHORITIES—continued

	Page
INS v. *St. Cyr*, 533 U.S. 289 (2001)	13
Jackson v. *Birmingham Bd. of Educ.*, 544 U.S. 167 (2005)	14, 15
Long Island Care at Home, Ltd. v. *Coke*, 127 S. Ct. 2339 (2007)	17
Murphy v. *Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332 (2d Cir. 2005), *rev'd on other grounds*, *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291 (2006)	2
Pa. Dep't of Corr. v. *Yeskey*, 524 U.S. 206 (1998)	13
Pennhurst State Sch. & Hosp. v. *Halderman*, 451 U.S. 1 (1981)	10, 15
Raygor v. *Regents of the Univ. of Minn.*, 534 U.S. 533 (2002)	11, 14
Sch. Comm. of the Town of Burlington v. *Dep't of Educ.*, 471 U.S. 359 (1985)	11, 12
Schaffer v. *Weast*, 546 U.S. 49 (2005)	25
Sch. Bd. of Nassau County v. *Arline*, 480 U.S. 273 (1987)	15
U.S. Nat'l Bank of Or. v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439 (1993)	1
United States v. *Fausto*, 484 U.S. 439 (1988)	13
United States v. *Newsome*, 139 F.3d 181 (3d Cir. 2006)	7
Whitman v. *Am. Trucking Ass'ns*, 531 U.S. 457 (2001)	16
Winkelman v. *Parma City Sch. Dist.*, 550 U.S. 516 (2007)	3
Wyeth v. *Levine*, 129 S. Ct. 1187 (2009)	18

TABLE OF AUTHORITIES—continued

STATUTES — Page

20 U.S.C. § 1401(9) (2000 & Supp. II 2003) . 27
§ 1411(e) (2000 & Supp. II 2003) . 27
§ 1412 (2000 & Supp. II 2003).. *passim*
§ 1412(a)(10)(A)(iii) (2006) 26
§ 1414 (2000 & Supp. II 2003)..... 19
§ 1415 (2000 & Supp. II 2003)..... 5, 9
§§ 1431-1445 (2000 & Supp. II 2003) 27
§ 1435(c) (2000 & Supp. II 2003).. 27
34 C.F.R. § 76.652(c) 26
§ 300.37..... 26
§ 300.111..... 25
§ 300.140(a) 26
§ 300.306(c)(2) 25
§ 300.323(c)..... 25
§ 300.403 (1999) 17
§ 300.453 (1999) 8
§ 300.512(b)(3) (1999) 18
62 Fed. Reg. 55,026 (proposed Oct. 22, 1997) 17, 18
64 Fed. Reg. 12,405 (Mar. 12, 1999)..... 16, 17

LEGISLATIVE HISTORY

143 Cong. Rec. S4295 (daily ed. May 12, 1997) 19

SCHOLARLY AUTHORITY

1 L. Tribe, *American Constitutional Law* (3d ed. 2000) 14

REPLY BRIEF

I. THE SPENDING CLAUSE CLEAR NOTICE RULE GOVERNS HERE.

The District demonstrated that IDEA does not, as required by the clear notice rule, unambiguously provide that States may be liable for tuition reimbursement awards where, as here, a child is unilaterally placed in private school without having received special education services from the school district. Pet. Br. 16-27. T.A.'s efforts to avoid application of the clear notice rule are unavailing.[1]

First, T.A. suggests that the District forfeited its Spending Clause argument by not raising it below. T.A. Br. 41-42; see also U.S. Br. 32. This issue was fully vetted in the certiorari papers. Opp. 28; Cert. Reply 7-8. As the District noted there, "when an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties." *U.S. Nat'l Bank of Or.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993) (internal quotation marks omitted). The District's claim throughout these proceedings has been that IDEA prohibits private-school tuition reimbursement awards to students like T.A. Pet. App. 11a-18a, 44a. The District may support that claim here by contending that IDEA should be interpreted through the lens of the Spending Clause clear notice rule. Cert. Reply 8 (collecting cases). Neither T.A. nor the government cites any case where this Court refused

---

[1] T.A. maintains in a footnote that the District's "failure to sue [his] parents raises a question of Article III standing." Resp. Br. 19 n.1. The government correctly explains why there is no standing problem. U.S. Br. 7 n.1.

to consider a rule of construction because it had not been raised below.

Indeed, T.A.'s forfeiture argument cannot be reconciled with *Arlington Central School District Board of Education* v. *Murphy*, 548 U.S. 291 (2006). In *Arlington*, the school district did not advance a Spending Clause argument in the court of appeals, Br. for Appellant, *Murphy* v. *Arlington Cent. Sch. Dist. Bd.*, 2004 WL 3438190 (2d Cir. May 26, 2004); the court of appeals did not consider whether the clear notice rule should apply, *Murphy* v. *Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332 (2d Cir. 2005); and, unlike here, the district did not raise a Spending Clause argument in its petition for certiorari, Pet. for Cert., *Arlington*, 2005 WL 1551323 (U.S. Jun. 27, 2005). The clear notice rule was first invoked in the government's invitation brief supporting certiorari. Br. of U.S. as *Amicus Curiae* at *12, *Arlington*, 2005 WL 3369167 (U.S. Dec. 9, 2005). Like T.A. here, the parents in *Arlington* argued that the school district's Spending Clause theory "was not raised below and thus is forfeited." Br. of Resp. at *16, *Arlington*, 2006 WL 838890 (U.S. Mar. 28, 2006). The parents' argument found no traction in *Arlington*, not even among the dissenters, as the Court proceeded to apply the clear notice rule to the IDEA provision at issue there. T.A. provides no reason to chart a different course in this case.

Second, T.A. maintains that the clear notice rule is inapplicable here because "tuition reimbursement 'does not impose any substantive condition or obligation on States they would not otherwise be required by law to observe.'" Resp. Br. 12 (quoting *Winkelman* v. *Parma City Sch. Dist.*, 550 U.S. 516, 534 (2007)); see also U.S. Br. 32-33 (same). This is so, T.A. continues, because tuition reimbursement is

already "inherent in IDEA's core obligation to provide a *free* appropriate education." Resp. Br. 42. T.A.'s contention misreads *Winkelman* and misunderstands the nature of a tuition reimbursement obligation.

Winkelman addressed whether IDEA granted parents an independently enforceable right to seek a free appropriate public education ("FAPE") for their children—and thus to proceed in court unrepresented by counsel. 550 U.S. at 519, 521-522. The Court held that the Spending Clause did not govern that interpretive dispute because "recognizing that some rights repose in both * * * parent[s] and * * * child[ren]" would not "expand[ ]" their "basic measure of monetary recovery." *Id.* at 534.

Here, by contrast, the "basic measure of monetary recovery" *would* be expanded by interpreting IDEA to allow school districts to be held liable for tuition reimbursement to students who are unilaterally placed in private school without first having received special education services from the district. See Council of the Great City Schools ("CGCS") Br. 21-33 (describing costs of tuition reimbursement for unilateral private school placements); City of New York Br. 2-4 (same); National School Boards Association ("NSBA") Br. 23-25 (describing how tuition reimbursement for students like T.A. undermines school districts' ability to accurately budget for and provide special education services). It is nonsensical for T.A. to suggest that private school tuition, which ordinarily pays for far more services than required by FAPE, is the equivalent of FAPE. See *Doe ex rel. Doe* v. *Bd. of Educ.*, 9 F.3d 455, 459-460 (6th Cir. 1992) (private school services may more closely resemble "a Cadillac" than the "educational equivalent of a Chevrolet," which is all a public school is obligated to provide under IDEA).

This case illustrates the point, as the hearing officer ordered the District to reimburse T.A.'s parents for the "costs incurred in sending T.A. to [Mount Bachelor Academy] * * * includ[ing] the initial application and interview fees; linen fee; monthly tuition charges; and 'alumni services' fees." Pet. App. 158a. The District's potential liability for those costs—including a $5200 per month tuition charge, a $1500 interview fee, and a $5200 alumni services fee, *id.* at 153a-154a—greatly outweighs the cost of providing a FAPE in a public school. See CGCS Br. 23 ("average expenditure per school-aged student in public school special education programs was $5,079, while the average special education expenditure per school-aged student in programs operated outside the public schools was $26,440—nearly five times as much"). Accordingly, as in *Arlington*, the Spending Clause requires inquiry into whether IDEA "furnishes clear notice regarding the liability at issue in this case." 548 U.S. at 296.

Third, T.A. incorrectly contends that the Spending Clause does not apply because "the remedy of reimbursement is not damages." Resp. Br. 42. *Arlington* asks whether "IDEA furnishes clear notice regarding the liability at issue." 548 U.S. at 296. It does not matter under the Spending Clause whether that liability consists of damages or is equitable in nature. *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 75 (1992) (clear notice rule applies even if monetary remedy is characterized as "equitable relief," given that such relief will "require state entities to pay monetary awards out of their treasuries").

II. IDEA DOES NOT PROVIDE CLEAR NOTICE OF A TUITION REIMBURSEMENT OBLIGATION TO STUDENTS LIKE T.A.

A. The 1997 Amendments Unambiguously Preclude Tuition Reimbursement To Students Like T.A.

1. The District demonstrated that, as amended in 1997, IDEA unambiguously precludes tuition reimbursement for students unilaterally placed in private school without first having received special education services from the school district. Pet. Br. 19-27. T.A. incorrectly asserts (Br. 17) that the District's conclusion rests exclusively on § 1412(a)(10)(C)(ii). To the contrary, the District's interpretation rests on the text and structure of IDEA as a whole. T.A. and the government do not even address, much less rebut, the District's specific arguments.

T.A. and the government repeatedly speak of the "authority" provided by 20 U.S.C. § 1415(i)(2)(B)(iii) (2000 & Supp. II 2003), *currently codified at* 20 U.S.C. § 1415(i)(2)(C)(iii), to grant tuition reimbursement to students like T.A.[2] In so doing, however, they fail to directly confront the fact that § 1415(i)(2)(B)(iii) grants remedial authority only to courts, while § 1412(a)(10)(C)(ii) grants authority—specifically, the authority to award tuition reimbursement where a student is unilaterally placed in private school—to courts *and* hearing officers. Pet. Br. 24-25. T.A. and the government nowhere explain how § 1415(i)(2)(B)(iii) can properly be interpreted to grant hearing officers *any* authority, let alone the authority to award tuition

---

[2] Unless otherwise noted, all statutory citations are to the 2000 edition and 2003 supplement of the United States Code. *See* Pet. Br. 3 n.1.

reimbursement. That the reimbursement in this case was awarded by the hearing officer, not the district court, makes T.A.'s and the government's silence all the more significant. Pet. App. 6a, 38a-39a, 158a.

Likewise, neither T.A. nor the government address the District's showing that the headings Congress used in § 1412(a)(10)—"PAYMENT FOR EDUCATION OF CHILDREN ENROLLED IN PRIVATE SCHOOLS WITHOUT CONSENT OF OR REFERRAL BY THE PUBLIC AGENCY" in § 1412(a)(10)(C), and "REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT" in § 1412(a)(10)(C)(ii)—manifest an intention to comprehensively address in those provisions the States' tuition reimbursement obligations for children unilaterally placed in private school. Pet. Br. 24. T.A. elsewhere argues that the headings in § 1412(a)(10) provide a clear indication of congressional intent. Resp. Br. 17. Yet, nowhere does he or the government give any reason why Congress, having deployed the headings it did in § 1412(a)(10)(C), would have intended courts or hearing officers to make tuition reimbursement awards under any other provision.

Finally, T.A. and the government do not confront the District's argument that Congress's failure to provide any standards to guide discretion in awarding tuition reimbursement for children who have not previously received special education services from a public agency—the way it did for children who have received such services, see 20 U.S.C. § 1412(a)(10)(C)(iii)—reveals Congress's intent to foreclose reimbursement in that situation. Pet. Br. 23 (citing *Arlington*, 548 U.S. at 298). Were there a plausible response to that argument, T.A. and the government would have articulated it.

2. Rather than address the District's analysis of IDEA's text and structure, T.A. and the government

myopically focus on § 1412(a)(10)(C)(i). Resp. Br. 17-19; U.S. Br. 16-17. They contend that this provision creates a "safe harbor" for tuition reimbursement where the district provides a FAPE. That "safe harbor," T.A. continues, gives rise to a "logically equivalent contrapositive" that Congress intended to authorize reimbursement in all other cases. Resp. Br. 17-19; see also U.S. Br. 16-17. This interpretation of § 1412(a)(10)(C)(i) fundamentally misreads the statute.

As an initial matter, T.A.'s interpretation is logically flawed. T.A. reasons as follows: subsection (C)(i) states that if the district provides a FAPE, it has no tuition reimbursement obligation; therefore, if the district does not provide a FAPE, it has a tuition reimbursement obligation. T.A.'s syllogism, "if *A* then *B*, so if not *A*, then not *B*," rests on a basic "fallacy of * * * logic." *United States* v. *Newsome*, 439 F.3d 181, 186 (3d Cir. 2006). The contrapositive actually is "if not B, then not A"—in this context, if a district pays for tuition reimbursement, then it did not provide a FAPE. The contrapositive merely confirms that the denial of a FAPE is a necessary condition for reimbursement, without speaking to whether there are any others.

That aside, the "general rule" governing a district's obligations to disabled children in private school is established not by § 1412(a)(10)(C)(i), but by § 1412(a)(10)(A). Section 1412(a)(10)(A) requires States to allocate to disabled children "enrolled by their parents in private * * * schools" a proportionate share of the federal funds the State receives under IDEA. 20 U.S.C. § 1412(a)(10)(A)(i)(I). The provision does not require a State to use its *own* funds to "underwrite for private-school children roughly the same on-site special education services that [they]

provide[ ] for public-school children." Br. of U.S. as *Amicus Curiae* at *9-10, *K.R.* v. *Anderson Cmty. Sch. Corp.*, 1997 WL 3356175 (U.S. Jun. 4, 1997); see also 34 C.F.R. § 300.453 (1999); U.S. Conf. of Mayors Br. 7-8; CGCS Br. 9. This distinction drawn by § 1412(a)(10)(A) between the State's own funds and the federal funds received under IDEA is significant, as federal funds cover only about twenty percent of IDEA's total costs. CGCS Br. 5-7.[3]

Congress carved only two exceptions to the general rule that States need only devote to disabled students in private school a proportionate share of the federal funds received under IDEA. First, § 1412(a)(10)(B) requires States to pay the tuition of students referred by a public agency to a private school. 20 U.S.C. § 1412(a)(10)(B). Second, § 1412(a)(10)(C)(ii) permits a tuition reimbursement award to parents of a child "who previously received special education and related services" from a district, when the district did not make available a FAPE "in a timely manner" prior to student's enrollment in private school. *Id.* § 1412(a)(10)(C)(ii). Subsection (C)(i) carves no further exception to the general rule established by § 1412(a)(10)(A); to the contrary, it expressly limits a district's financial obligations "[s]ubject to subparagraph [1412(a)(10)](A)." *Id.* § 1412(a)(10)(C)(i).

---

[3] Contrary to the "general rule" argument it advances here, U.S. Br. 11 (contending "all children with disabilities—regardless of whether they are enrolled in public or private school—enjoy the right to a [FAPE]"), the United States previously advanced the opposite view: "[T]he IDEA gives school districts no regulatory authority over private schools, *nor does it require school districts to provide a free appropriate education to children enrolled in private or home schools*." Br. of U.S. as *Amicus Curiae* at *20, *Fitzgerald* v. *Camdenton R-III Sch. Dist.*, 2005 WL 3627721 (8th Cir. Oct. 3, 2005) (citing § 1412(a)(10)(C)(i)) (emphasis added).

Moreover, T.A.'s and the government's reliance on § 1412(a)(10)(C)(i) to create a general reimbursement obligation is "at odds with one of the most basic interpretive canons, that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley* v. *United States*, 556 U.S. __, 2009 WL 901513, at *8 (Apr. 6, 2009) (internal quotation marks and citation omitted). According to T.A., § 1412(a)(10)(C)(i) makes "payment of private school tuition * * * available * * * in all cases except where the school district makes a FAPE available to the child with a disability." Resp. Br. 21. Such a reading would render subsection (C)(ii) entirely superfluous, for it "would add nothing" to what subsection (C)(i) already provides. *Corley*, 2009 WL 901513, at *8.

Finally, T.A. argues that the District's reading of IDEA conflicts with the principle that only clear congressional intent can limit a court's equitable powers. Resp. Br. 27-29. That principle, whatever its validity in other circumstances, has no application to a Spending Clause statute, where the rule is that courts may impose only those obligations clearly articulated in the statutory text. Were matters otherwise, *Arlington* was wrongly decided, for § 1415(i)(2)(B)(iii) alone would have allowed courts to require school districts to reimburse prevailing parents for their expert fees, irrespective of whether § 1415(i)(3)(B) permitted the same relief.

In any event, § 1415(i)(2)(B)(iii) allows a court the discretion to "grant such relief as [it] determines is appropriate." 20 U.S.C. § 1415(i)(2)(B)(iii). The range of "appropriate" relief available under that provision depends not only on traditional notions of equity, but also on other provisions Congress enacted

in IDEA. Here, regardless of whether the clear notice rule applies, the 1997 Amendments plainly provide that tuition reimbursement may not be awarded where students are unilaterally placed in private school without first having received special education services from a public agency. Pet. Br. 19-27. Such reimbursement, therefore, cannot be "appropriate" relief under § 1415(i)(2)(B)(iii).

B. At Most, IDEA Fails To Impose Any Unambiguous Tuition Reimbursement Obligation Under These Circumstances.

Even if the 1997 Amendments did not clearly preclude tuition reimbursement in these circumstances, T.A. and the government fail to show that IDEA unambiguously imposes such an obligation. See Pet. Br. 16-19, 27-28. T.A. and the government studiously avoid the text of § 1415(i)(2)(B)(iii) in arguing that the provision authorizes hearing officers and courts to award reimbursement. Rather, as noted above, they rely on § 1412(a)(10)(C)(i) to contend that IDEA precludes reimbursement only when a district makes a FAPE available. Resp. Br. 17-23; U.S. Br. 17.

Even putting aside the above-noted flaws with T.A.'s reading of subsection (C)(i), the provision fails to provide the unambiguous statement required by the Spending Clause. The Spending Clause clear notice rule, articulated most famously in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981), requires the same degree of textual specificity as the plain statement rule set forth a decade later in *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991). See *id.* at 470 ("The *Pennhurst* rule looks much like the plain statement rule we apply today."). The *Gregory* rule, in turn, requires a "clear statement of what the rule *includes*, not a clear statement of what it *excludes*."

Raygor v. *Regents of the Univ. of Minn.*, 534 U.S. 533, 546 (2002).

It is beyond dispute that while subsection (C)(i) *excludes* a reimbursement obligation under some circumstances, neither it nor any other IDEA provision expressly *includes* a reimbursement obligation for students like T.A. Section 1412(a)(10)(B) speaks to children referred to private school by a district, and states that the district shall pay their tuition. Section 1412(a)(10)(C)(i) addresses children unilaterally placed in private school who were provided a FAPE by a district, and states that the district need not pay their tuition. Sections 1412(a)(10)(C)(ii)-(iv) address children unilaterally placed in private school, who were denied a FAPE by a district, and who previously received special education services from the district, and states that the district may be required to pay their tuition.

No provision specifically addresses children unilaterally placed in private school, who were denied a FAPE by a district, but who did not previously receive special education services from the district. The most that can be said, then, is that IDEA is ambiguous as to the availability of reimbursement in those circumstances. Indeed, that is precisely what the Second and Ninth Circuits said about IDEA—although they then failed to conclude, as the Spending Clause requires, that no reimbursement obligation may be imposed. Pet. App. 14a-15a; *Frank G.* v. *Bd. of Educ.*, 459 F.3d 356, 370 (2d Cir. 2006), *cert. denied*, 128 S. Ct. 136 (2007).

C. *Burlington* and *Carter* Do Not Provide Clear Notice.

The District demonstrated that *School Committee of the Town of Burlington* v. *Department of*

Education, 471 U.S. 359 (1985), and *Florence County School District Four* v. *Carter*, 510 U.S. 7 (1993), do not provide clear notice of any tuition reimbursement obligation for unilaterally placed children who did not previously receive special education services from the district. Pet. Br. 30-33. *Burlington* interpreted § 1415(i)(2)(B)(iii), which directs "the court" to "grant such relief as [it] determines is appropriate," to permit tuition reimbursement awards for children unilaterally placed in private school. Significantly, the Court premised its holding on the fact that IDEA then included no "other reference" to tuition reimbursement to such children. 471 U.S. at 369. In the 1997 Amendments, Congress provided the "other reference" found absent in *Burlington*, specifically articulating the States' tuition reimbursement obligations toward those children. 20 U.S.C. § 1412(a)(10)(C).

T.A. and the government do not confront *Burlington*'s "[a]bsent other reference" proviso, let alone explain why the 1997 Amendments do not provide the "other reference" that was missing in 1985. Instead, the government contends that the District's position "impliedly repeal[s] part of the authority conferred by" § 1415(i)(2)(B)(iii), as interpreted in *Burlington*. U.S. Br. 18. That contention fails for the reason noted above—*Burlington*'s "[a]bsent other reference" proviso acknowledged that Congress might amend IDEA to expressly address tuition reimbursement for unilaterally placed private school students, which in turn would impact whether reimbursement would continue to be "appropriate" under § 1415(i)(2)(B)(iii).

In any event, the government's contention rests on the incorrect premise that *Burlington* interpreted § 1415(i)(2)(B)(iii) to permit reimbursement to *any*

student unilaterally placed in private school. In fact, *Burlington* and *Carter* addressed reimbursement claims by students who had previously received special education services from the district. Pet. Br. 31. Because § 1412(a)(10)(C)(ii) permits such reimbursement, the 1997 Amendments cannot be said to have repealed, impliedly or otherwise, what *Burlington* and *Carter* held to be the reach of § 1415(i)(2)(B)(iii). See *United States* v. *Fausto*, 484 U.S. 439, 453 (1988).

D. The Department's Commentary Does Not Provide Clear Notice, And Is Not Entitled To Deference In Any Event.

The District demonstrated that the Department of Education's commentary concerning the availability of tuition reimbursement to students like T.A. does not provide the clear notice required by the Spending Clause. Pet. Br. 33-38. The reason, explained the District, is that clear notice must be provided by the statutory text enacted by Congress, not an agency's interpretation of a purported textual ambiguity. See *Arlington*, 548 U.S. at 296 ("we must ask whether the IDEA furnishes clear notice"); *Bd. of Educ.* v. *Rowley*, 458 U.S. 176, 190 n.11 (1982) (no clear notice where Court "unable to find any suggestion from the face of the statute [of] the requirement" in question). This focus on statutory text is a common feature of clear statement rules. See, *e.g.*, *Pa. Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 209 (1998) (plain statement rule satisfied where the "statute's language [is] unmistakabl[e]"); *Hilton* v. *S.C. Pub. Ry. Comm.*, 502 U.S. 197, 204 (1991) (intent to abrogate sovereign immunity "must be expressed in the text of the statute"); *INS* v. *St. Cyr*, 533 U.S. 289, 299 n.10 (2001) (collecting cases).

Focusing on the statutory text "helps assure that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Raygor*, 534 U.S. at 544. "[B]y refusing to construe ambiguous legislation expansively, the Court can effectively prevent Congress from avoiding hard questions of federal-state relations, and can thus increase the likelihood that Congress will give full attention to the interests of the states." 1 L. Tribe, *American Constitutional Law* 856 (3d ed. 2000). As the Court has recognized, the federal government's structure, in which each of the States is represented in Congress, provides assurance that the States' sovereign interests are taken into consideration when Congress exercises its Article I authority. *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547-555 (1985).

No comparable assurances accompany agency interpretations of ambiguous congressional enactments. See *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting) ("[u]nlike Congress, administrative agencies are clearly not designed to represent the interests of States"). Moreover, if an agency's interpretation of an ambiguous text could satisfy the Spending Clause, then application of the clear notice rule would depend on the executive's whim, for an agency could always provide the clarity that Congress, by accident or design, failed to provide in an ambiguous text. Pet. Br. 36-38.

T.A. and the government respond that *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167, 183 (2005), rejected a Spending Clause argument based "in part" on the notice supposedly provided by the Department's regulations. Resp. Br. 43; U.S. Br. 33. That is wrong. The *Jackson* majority explained: "We

do not rely on regulations extending Title IX's protection beyond its statutory limits; indeed, we do not rely on the Department of Education's regulation at all, because the statute *itself* contains the necessary prohibition. * * * We reach this result based on the statute's text." 544 U.S. at 178; accord, *Gomez-Perez* v. *Potter*, 128 S. Ct. 1931, 1939 (2008) ("the holding in *Jackson* was based on an interpretation of the 'text of Title IX'") (quoting *Jackson*, 544 U.S. at 173). Accordingly, *Jackson* did not hold that regulations can provide the clear notice demanded by the Spending Clause. Rather, the regulations merely confirmed the clear notice that the Court found in the text.

The other cases cited by T.A., *Pennhurst* and *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987), are to the same effect. *Arline*'s "holding [wa]s premised on the plain language of the Act," *id.* at 286 n.15, and *Pennhurst* concluded that the "plain language" of the statute refuted the notion that Congress had provided the requisite notice. 451 U.S. at 23. Here, by contrast, T.A. and the government are compelled to rely on the Department's commentary to remedy a purported ambiguity in the statute. U.S. Br. 10; Resp. Br. 15. This the Spending Clause does not permit.

2. Even if agency interpretations could provide clear notice under the Spending Clause, the Department's interpretation of the 1997 Amendments deserves no deference. Pet. Br. 34-36. No deference is permitted because the Amendments unambiguously prohibit tuition reimbursement to students like T.A. But even if the Amendments were ambiguous, the Department's commentary fails to persuade.

T.A. and the government fail to defend the Department's absurdly counter-textual statement that "*hearing officers* and courts retain their authority" under § 1415(i)(2)(B)(iii)—which, as noted above, grants authority only to courts—to award tuition reimbursement to students like T.A. 64 Fed. Reg. 12,405, 12,602 (Mar. 12, 1999) (codified at 34 C.F.R. § 300.403) (emphasis added). Indeed, other than directly quoting the Department's commentary, T.A. and the government take great pains to avoid suggesting that § 1415(i)(2)(B)(iii) grants tuition reimbursement (or any other) authority to hearing officers. Compare Resp. Br. 13, 16, 23, 30, 42 (noting that § 1415(i)(2)(B)(iii) grants authority to "courts" or "the court"), and U.S. Br. 3, 9, 10, 12, 18, 19, 31 (same), with Resp. Br. 39 (quoting Department's statement that "'*hearing officers* * * * retain their authority'" under § 1415(i)(2)(B)(iii)), and U.S. Br. 30 (same). The fact that T.A. and the government cannot even bring themselves to say that § 1415(i)(2)(B)(iii) grants authority to hearing officers speaks volumes about their confidence in the Department's view that the provision does just that.

The general principles recited by T.A. and the government fare no better. Both cite *Whitman* v. *American Trucking Association*, 531 U.S. 457 (2001), for the proposition that agency preambles categorically deserve *Chevron* deference. U.S. Br. 31; Resp. Br. 41. *Whitman* does not stand for that proposition. Although *Whitman* cites *Chevron* in passing, the Court ultimately rejected the agency's interpretation because it went beyond any statutory ambiguity and contradicted what was "quite clear" in the statute. 531 U.S. at 481. As such, the Court never had to address the level of deference that would have

applied had the agency interpretation been reasonable.

Similarly, T.A. and the government err in relying on *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2349 (2007), which accorded deference to an "Advisory Memorandum" setting forth the agency's interpretation of its own regulations. U.S. Br. 31; Resp. Br. 41. In *Long Island Care*, (1) the statute at issue was not subject to a clear notice requirement and expressly left "gaps *** as to the scope and definition" of the terms it used, 127 S. Ct. at 2346; (2) the agency filled those gaps through interpretative regulations that expounded upon the terms in the statute, *id.* at 2346, 2347-2348; and (3) the Memorandum interpreted those freestanding regulations, *id.* at 2349. Here, by contrast, (1) Spending Clause legislation does not leave gaps to fill, and IDEA contains a narrow delegation to the Department, see Pet. Br. 34-35; (2) the relevant regulations do not interpret the statutory terms, but merely "parrot" them word-for-word, *id.* at 36 (citing *Gonzales* v. *Oregon*, 546 U.S. 243, 257-258 (2006)); and (3) as discussed above, the Department's commentary is erroneous on its face.

Additionally, the government and T.A. mistakenly claim that the Department's commentary evidences the formality and consistency necessary to warrant heightened deference. U.S. Br. 31; Resp. Br. 40. The proposed and final rules drew their authority from § 1412(a)(10)(C)(ii) alone. 62 Fed. Reg. 55,026, 55,042 (proposed Oct. 22, 1997); 34 C.F.R. § 300.103 (1999). The commentary itself, though purporting to interpret 34 C.F.R. § 300.103, in fact interprets a different section altogether, § 1415(i)(2)(B)(iii). 64 Fed. Reg. at 12,601-02. The Department, however, never solicited comment on regulations implementing

§ 1415(i)(2)(B)(iii), see 62 Fed. Reg. at 55,046, and never issued a regulation advancing its current interpretation of that provision, see 34 C.F.R. § 300.512(b)(3) (1999). Under the circumstances, the commentary is not sufficiently formal to carry any weight. See *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1200-1201 (2009) (giving no deference to agency preamble that "articulated a sweeping position" upon which "States or other interested parties [were not given] notice or opportunity for comment"); see also *id.* at 1204 (Breyer, J., concurring) (to be accorded deference, position taken in agency's preamble should have been embodied "in lawful specific regulations").

E. The Legislative History Does Not Provide Clear Notice.

T.A. and the government also cite the legislative history of the 1997 Amendments to support their position. Resp. Br. 25-27; U.S. Br. 28-29. Their arguments fail for two reasons.

1. Like agency interpretations, legislative history cannot provide the clear notice demanded by the Spending Clause. *Arlington*, 548 U.S. at 304 ("In a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds."); *Rowley*, 158 U.S. at 201 n.26. Applying an analogous plain statement rule in *Dellmuth* v. *Muth*, 491 U.S. 223 (1989), the Court held that the legislative history of IDEA's predecessor was insufficient to abrogate the States' sovereign immunity, explaining that Congress's intent must be "'unmistakably clear in the language of the statute.'" *Id.* at 230; accord, *Hilton*, 502 U.S. at 204. As Justice Marshall noted: "When they apply, such [clear statement] rules foreclose inquiry into extrinsic guides to interpretation * * * ."

EEOC v. *Arabian Am. Oil Co.*, 499 U.S. 244, 262-263 (1991) (Marshall, J., dissenting).

2. In any event, the legislative history cited by T.A. and the government do not advance their cause. First, Senator Harkin's floor statement (see Resp. Br. 25) merely describes § 1412(a)(10)(C)(i), saying nothing about what categories of students are eligible for reimbursement.

Second, T.A. points to Senator Jeffords' statement that the 1997 Amendments would ensure that public schools had "an opportunity to offer a [FAPE], *before* the child's parents place the child in a private school and send the school district the bill." 143 Cong. Rec. S4295, S4296 (daily ed. May 12, 1997) (emphasis added), *quoted in* Resp. Br. 25. T.A.'s reliance on that statement is puzzling, as his parents deprived the District of the "opportunity" to offer T.A. a FAPE before he alighted to Mount Bachelor Academy.[4] Although the parents could have requested that T.A. be evaluated under IDEA, 20 U.S.C. § 1414, they failed to do so. Nor did they give the District any other IDEA-compliant notice that they suspected T.A. was disabled and wished to obtain special education services for him. Pet. App. 51a. What is more, T.A.'s

---

[4] Although T.A. claims that his 2001 evaluation was deficient, Resp. Br. 5-6, the district court noted that T.A.'s parents did not properly pursue any claims with respect to that evaluation. Pet. App. 51a; *see also* Pet. Br. 13; NSBA Br. 17-18 n.4. And while T.A. implies that the District's 2001 evaluation is somehow part of this case, Resp. Br. 1, the district court held that "[t]he adequacy of the 2001 evaluation was not an appropriate subject for the 2003 due process hearing" at issue here. Pet. App. 39a n.3. T.A.'s parents never invoked their right to request an evaluation or re-evaluation under IDEA until T.A. had been withdrawn from the District. Pet. Br. 13; Pet. App. 51a, 149a; NSBA Br. 17 n.4.

parents failed to do so while concealing from the District (*id.* at 94a) that T.A.'s private therapist—who had experience in conducting disability evaluations for the District, *id.* at 90a—at least twice recommended that T.A. be evaluated for ADHD, *id.* at 91a, and that his primary care physician had queried whether he had ADD, *id.* at 102a. See also J.A. 38 (discussing "work[] up * * * for an ADD evaluation" about which the District also was not apprised).

Finally, T.A. and the government advance a tortured reading of the Committee Reports. As the District noted, both reports explain that section 1412:

> specifies that parents may be reimbursed for the cost of a private education placement under certain conditions (i.e., when a due process hearing officer or judge determines that a public agency had not made a [FAPE] available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency's consent). *Previously, the child must have had received special education and related services under the authority of a public agency.*

Pet. Br. 26 (internal quotation marks omitted). The government and T.A. attempt to explain away the second sentence "as a description of prior law * * * , not the intended future effect of the amendments." U.S. Br. 29; Resp. Br. 27.

That cannot possibly be correct. The second sentence tracks § 1412(a)(10)(C)(ii) nearly word-for-word. See 20 U.S.C. § 1412(a)(10)(C)(ii) ("If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, * * * ."). The

sentence therefore plainly refers to that newly enacted provision, not to prior law. But even if T.A. and the government correctly read the sentence, it would not advance their cause. After all, if Congress believed in 1997 that that "prior law" allowed tuition reimbursement *only* for students who had previously received special education services from a public agency, T.A. could prevail here only if Congress intended to *expand* the States' reimbursement obligations to students who had not previously received such services. Such an understanding cannot be squared with the 1997 Amendments.

F. T.A.'s Interpretation Of IDEA Would Create, Not Prevent, Perverse Results.

1. T.A. and the government interpret IDEA to impose liability that States never could have anticipated. T.A.'s construction allows tuition reimbursement for time periods *before* a school district is made aware: (i) that the parents were dissatisfied with the education their child was receiving; (ii) that the parents would like their child evaluated for special education; and even (iii) that the child had been placed in the private school for which reimbursement was sought. This result is not far-fetched; it is precisely what happened here. Pet. App. 149a, 151a, 153a-154a, 158a.

If T.A.'s view prevails, the States' reimbursement liability will expand dramatically. Any parents who voluntarily choose to enroll their child in private school, irrespective of whether they previously sought IDEA eligibility, would have the incentive to demand an individualized educational program ("IEP"), only to challenge it in the hopes of having a court order tuition reimbursement. Acknowledging this potential, T.A. and the government respond that parents would be discouraged from taking such action

because they would run the "'financial risk'" that the district's proposal will be found to provide a FAPE. Resp. Br. 38; U.S. Br. 13, 16, 27. But that disincentive is hardly a given. Indeed, T.A. admits that his parents "were not aware, before placing [him] at MBA, that the district could be held responsible for paying private school expenses." Resp. Br. 9. Consequently, T.A.'s parents incurred *no risk* by placing T.A. at Mount Bachelor and then litigating against the District. Likewise, any parents who voluntarily place a student in private school would stand only to gain in the form of a subsidy for tuition they otherwise were planning to pay, so long as they could find an attorney willing to work on contingency. See NSBA Br. 28 (discussing the "tuition-reimbursement lottery" likely to ensue).

2. Additionally, T.A. and the government admit that, under their construction of IDEA, the limits on reimbursement set forth in § 1412(a)(10)(c)(iii) govern only those children who previously received special education services from a public agency pursuant to IDEA. Resp. Br. 22; U.S. Br. 4, 17. Yet nowhere do they explain why Congress would divide students eligible for private tuition reimbursement into two categories: (i) students who previously received special education services from the district subject to the limitations of § 1412(a)(10)(C)(iii), and (ii) students who have not received such services subject only to general principles of equity under § 1415(i)(2)(B)(iii). Nor do they attempt to explain why Congress would impose the limitations of § 1412(a)(10)(C)(iii) on parents who in good faith collaborate with districts, and not on parents who, prior to enrolling their child in private school, do not give the district a chance to evaluate their child and provide a FAPE. See Pet. Br. 40; NSBA Br. 7-8;

CGCS Br. 20-21; City of New York Br. 14-15; U.S. Conf. of Mayors Br. 16-17. Any such attempt would be futile, as Congress cannot be understood to have placed a lower burden on parents who preemptively enroll a child in private school without engaging the district regarding whether and, if so, what type of special education would be available.

3. T.A. and the government contend that the District's construction of IDEA will allow school districts to forever disqualify students from obtaining tuition reimbursement by repeatedly declaring them ineligible under IDEA, thereby precluding them from ever obtaining the special education services that (according to the District) is a prerequisite to reimbursement. U.S. Br. 23; Resp. Br. 20, 33-35. This, T.A. and the government warn, would lead to students languishing in deficient public school placements.

Before proceeding, it bears mention that any "languishing" here was caused not by the District, but by T.A.'s parents. Among other things, the parents:

> (1) were repeatedly put on notice by T.A.'s therapist and physician that he should be evaluated for ADHD, ADD, or learning disabilities, Pet. App. 90a-91a;
>
> (2) withheld this information from the District until litigation, *id.* at 94a n.18;
>
> (3) did not invoke any IDEA procedures after the 2001 evaluation, even when expressly told by District personnel that they could do so, *id.* at 27a-28a, 39a n.3; see Mot. to Dismiss Hr'g. Ex. B3a (Or. Superintendent of Pub. Educ. May 21,

2003), *collected in* Transmittal of Record, Separate Packet (D. Or.);[5]

(4) did not provide the District with any notice that they desired an evaluation prior to the unilateral placement, Pet. App. 49a;

(5) did not notify the District of their dissatisfactions for nearly one month after T.A. was enrolled at Mount Bachelor, and only then did so by filing a due process complaint concerning issues about which they provided the District with no prior notice, *id.* at 149a; and

(6) agreed to an alternative, extended time line (see Pet. Br. 39) for resolution of their complaint, Pet. App. 56a-57a (noting continuance); Transmittal of Record at 155, 181, *T.A.* v. *Forest Grove Sch. Dist.*, No. 04-cv-331 (D. Or. Mar. 22, 2004) (notice of bifurcation of hearing and letter reflecting agreement to alternative dispute time line); see also NSBA Br. 17; CGCS Br. 17.

In any event, T.A.'s suggestion that a disabled child "could be denied all access to free special education services for the entire period of protracted litigation over eligibility," Resp. Br. 37, is incorrect. Once a

---

[5] This Exhibit refutes T.A.'s claim that "[t]he school district did not respond" to Mrs. A.'s August 30, 2001 email to the District. Resp. Br. 7. The Exhibit shows that Mr. Martin responded via email on September 4, 2001, informing Mrs. A. that the District was willing "to reconsider eligibility during the school year." Mot. to Dismiss Hrg. Ex. B2a. Moreover, Mr. Martin emailed Mrs. A. the next day, reiterating that the District and T.A. "could revisit consideration of an eligibility [*sic*] for T.A." and specifically informed her how to avail herself of IDEA's procedures, stating "if parents and/or teachers want to re-refer [T.A.] for consideration of a learning disability and special education services, the process would need to start again with a referral through his guidance counselor." *Ibid.*

hearing officer finds a child eligible under IDEA, the school district must hold "[a] meeting to develop an IEP" within 30 days and provide services under an IEP "[a]s soon as possible" thereafter. See 34 C.F.R. §§ 300.306(c)(2), 300.323(c).

The District complied with its obligations, developing an IEP for T.A. less than four weeks after the hearing officer ruled him eligible under IDEA. See *In re Educ. of T.A.*, No. DP 04-108, slip op. at 1 (Or. Superintendent of Pub. Educ. May 7, 2004) (attached hereto as Addendum at Add.2) (noting IEP was proposed on February 19, 2004). The District's proposed IEP was presumed valid, see *Schaffer* v. *Weast*, 546 U.S. 49, 59 (2005), and T.A.'s parents could have become eligible under § 1412(a)(10)(C)(ii) to bring a tuition reimbursement claim by allowing the District to provide services to T.A. under the IEP. Instead, T.A.'s parents rejected that IEP, without giving it a chance to work, and kept T.A. at Mount Bachelor. See Add.2.

4. T.A. and the government also contend that the District's construction of IDEA would undermine the "Child Find" provisions of 20 U.S.C. § 1412(a)(3) by "deny[ing] such children an appropriate education * * * because the children had not previously received special education services." Resp. Br. 21; U.S. Br. 21 n.2. This argument is meritless.

The Child Find provisions are not a vehicle for tuition reimbursement. They merely impose duties on districts to "identif[y], locate[] and evaluate[]" children potentially eligible for services under IDEA. 20 U.S.C. § 1412(a)(3); see also 34 C.F.R. § 300.111. There is no obligation that parents of a disabled child request services from the district, as they may be perfectly content with the services provided by the private school. Even parents who seek an evaluation

for a child who is then found eligible under IDEA may elect to keep their child enrolled in private school and receive proportionate share services under § 1412(a)(10)(A). For those students, the district must create a "services plan" of special education services. 34 C.F.R. § 300.37; see also 20 U.S.C. § 1412(a)(10)(A)(i). The district must consult with private school representatives and parents in developing the services plan, 20 U.S.C. § 1412(a)(10)(A)(iii) (2006), and when the district is making the final decisions regarding the plan, parents need be provided only an "opportunity to express their views," 34 C.F.R. § 76.652(c), not a full due process hearing, *id.* § 300.140(a).

Parents, of course, may request that the district develop an IEP for children found disabled, and the district's recommended placement may be that the child receive services in public school. But in the end, it is impossible to see how the District's interpretation of IDEA will cause any breach of the Child Find obligation. Only where a child who has not previously received special education services from a public agency rejects a district's proposed IEP, and instead seeks private tuition reimbursement, would any limitation come into play. That limitation, however, has nothing to do with Child Find. It is the same limitation faced by any student who has not previously received special education services from the district, regardless of whether the student came to the district's via Child Find or in some other way.

5. Finally, the government contends that the District's reading of IDEA is absurd because it would disallow tuition reimbursement for preschool students. U.S. Br. 26. That contention, too, is meritless.

IDEA obligates school districts to offer "early intervention services" to all developmentally delayed infants and toddlers until the age of three. 20 U.S.C. §§ 1431-1445. The statute, however, imposes only a limited obligation on States with respect to children aged three through five. *Id.* § 1412(a)(1)(B)(i). Although FAPE may include "an appropriate preschool * * * education," *id.* § 1401(9)(C), there is no obligation to make FAPE available to children aged three through five if it "would be inconsistent with State law or practice," *id.* § 1412(a)(1)(B)(i). Because preschool is rarely public, and hardly ever universal, state law infrequently imposes an obligation to make FAPE available to such children. Indeed, IDEA recognizes as much by giving parents the "right[] * * * to elect to receive [early intervention] services" for their children beyond the age of three until they "enter, or are eligible under State law to enter, kindergarten, or elementary school." *Id.* §§ 1411(e)(7), 1435(c)(2)(A), (E); see also *id.* § 1435(c)(5) (stating that children receiving early intervention services have no entitlement to FAPE).

Accordingly, it is the rare exception that children receive preschool education from the States. Given that no underlying right to a free preschool education exists, it is understandable that Congress did not include in § 1412(a)(10)(C)(ii) a reimbursement obligation for preschool education. Furthermore, because the availability of "intervention services" terminates upon elementary school enrollment, it was perfectly logical for Congress to create the first opportunity for tuition reimbursement at that stage of a disabled child's education.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

EAMON P. JOYCE
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300

GARY FEINERMAN*
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

RYAN C. MORRIS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

RICHARD COHN-LEE
ANDREA L. HUNGERFORD
THE HUNGERFORD LAW FIRM, LLP
P.O. Box 3010
Oregon City, OR 97045
(503) 650-7990

Counsel for Petitioner

April 21, 2009

*Counsel of Record

ADDENDUM

BEFORE THE OFFICE OF
ADMINISTRATIVE HEARINGS (OAH)
STATE OF OREGON
for the
SUPERINTENDENT OF PUBLIC INSTRUCTION

Agency Case No. DP 04-108

In the Matter of the Education of TA v.
Forest Grove School District

DISMISSAL ORDER

HISTORY OF THE CASE

On January 28, 2004, T.A.'s parents filed a request for a due process hearing with the State Superintendent of Public Instruction. Attorney at law Mary E. Broadhurst represented the parents. Attorney at Law Richard Cohn-Lee represented the Forest Grove School District (District). Both parties waived the 45 day requirement. A prehearing conference was held on March 23, 2004 with Administrative Law Judge (ALJ) Ella D. Johnson presiding. The due process hearing was scheduled for April 19 and 26 in Forest Grove. T.A. and his parents renewed their request for a Stay-Put Order determining that Mount Bachelor Academy was the stay-put placement. On March 23, 2004, I issued the Interim Order Determining Stay-Put, finding that the current placement for T.A. during the duration of

this dispute was Mount Bachelor Academy. Prior to the hearing, the parties settled the matter.

FINDINGS OF FACT

(1) In their request for a due process hearing, T.A. and his parents identified the following issues for hearing: (1) Is the February 19, 2004 IEP offered by the District reasonably calculated to provide T.A. with educational benefit sufficient enough to allow him to graduate in June of 2004, given that MBA believes he will be able to graduate from its program with a high school diploma in June of 2004; (2) Is the February 19, 2004 placement offered by the District reasonably calculated to provide T.A. with educational benefit sufficient to provide T.A. with educational benefit sufficient enough to allow him to graduate in June of 2004, given that MBA believes he will be able to graduate from its program with a high school diploma in June of 2004; and (3) Is it equitable, in light of the District's failure to provide a free appropriate public education prior to his placement at MBA in March of 2003, to require T.A. to return to the high school after the start of his final semester of high school.

(2) On April 12, 2004, the attorney for T.A. and his parents advised me that the matter had been settled, pending signature of both parties on the settlement document. On May 6, 2004, I received confirmation from the attorney for T.A. and his parents that the matter had been settled and a hearing was no longer required.

(3) Accordingly, a due process hearing is no longer required in this matter, based on the representation by the attorney for T.A. and his parents that a mutual settlement of the issues raised by the hearing request had been achieved.

ORDER

The hearing request of January 28, 2004, having been withdrawn in its entirety, is DISMISSED.

/s/ Jo Ellen Odle
Ella D. Johnson
Administrative Law Judge
Office of Administrative Hearings

NOTICE TO ALL PARTIES: If you are dissatisfied with this Order you may, within 120 days after the mailing date on this Order, commence a nonjury civil action in any state court of competent jurisdiction, ORS 343.175, or in the United States District Court, 20 U.S.C. § 1415(e)(2). Failure to request review within the time allowed will result in LOSS OF YOUR RIGHT TO APPEAL FROM THIS ORDER.

ENTERED at Salem, Oregon this 7th day of May 2004[.]

AMICUS CURIAE BRIEF

1-5

MAR 31

(14)

No. 08-305

In the Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT, PETITIONER

v.

T.A.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

ELENA KAGAN
Solicitor General
Counsel of Record

LORETTA KING
Acting Assistant Attorney General

NEAL KUMAR KATYAL
Deputy Solicitor General

ERIC D. MILLER
Assistant to the Solicitor General

MARK L. GROSS
KARL N. GELLERT
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

PHILIP H. ROSENFELT
Deputy General Counsel
Department of Education
Washington, D.C. 20202

809

QUESTION PRESENTED

Whether the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*, permits an award of private-school tuition reimbursement when a child with a disability has been denied a free appropriate public education, but has not "previously received special education and related services under the authority of a public agency," 20 U.S.C. 1412(a)(10)(C)(ii).

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 8
Argument:
Private-school tuition reimbursement may be awarded to the parents of a child who has not previously received public special education when the child has been denied a free appropriate public education 11
A. The plain text of IDEA provides for reimbursement of private-school tuition when a school district fails to provide a free appropriate public education 12
1. Section 1415(i)(2)(C)(iii) authorizes awards reimbursing private-school tuition 12
2. Nothing in Section 1412(a)(10)(C) precludes an award of private-school tuition to the parents of a child who did not previously receive public special education 15
3. Petitioner's interpretation of Section 1412(a)(10)(C)(ii) disregards the canon against implied repeals 18
4. Petitioner's reading ignores key provisions of IDEA and is inconsistent with the overall structure of the Act 20
B. Petitioner's interpretation produces perverse consequences 23
C. The legislative history does not support petitioner's interpretation 28
D. The formal position of the agency charged with implementing IDEA is entitled to deference 29

Table of Contents—Continued: Page

E. The Spending Clause does not require a different result 32
Conclusion 34

TABLE OF AUTHORITIES

Cases:

Baltimore City Bd. of Sch. Comm'rs v. *Taylorch*, 395 F. Supp. 2d 246 (D. Md. 2005) 25
Board of Educ. v. *Rowley*, 458 U.S. 176 (1982) 2
Board of Educ. v. *Tom F.*, 128 S. Ct. 1 (2007) 2
Branch v. *Smith*, 538 U.S. 254 (2003) 18, 19
Carter v. *Florence County Sch. Dist.*, 950 F.2d 156 (4th Cir. 1991) 14
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) .. 30, 32
Chisom v. *Roemer*, 501 U.S. 380 (1991) 28
Connecticut Nat'l Bank v. *Germain*, 503 U.S. 249 (1992) 20
Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 32
Davis v. *Michigan Dep't of the Treasury*, 489 U.S. 803 (1989) 20
Edwards-White v. *District of Columbia*, 785 F. Supp. 1022 (D.D.C. 1992) 15
Florence County Sch. Dist. Four v. *Carter*, 510 U.S. 7 (1993) ..... *passim*
Frank G. v. *Board of Educ.*, 459 F.3d 356 (2d Cir. 2006), cert. denied, 128 S. Ct. 436 (2007) 7
Gadsby v. *Grasmick*, 109 F.3d 940 (4th Cir. 1997) 15
Glus v. *Brooklyn E. Dist. Terminal*, 359 U.S. 231 (1959) 24

Cases—Continued: Page

Green v. *Bock Laundry Mach. Co.*, 490 U.S. 504 (1989) 23
Griffin v. *Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) 23
Hanover Bank v. *Commissioner*, 369 U.S. 672 (1962) ... 16
Ivan P. v. *Westport Bd. of Educ.*, 865 F. Supp. 74 (D. Conn. 1994), aff'd, 101 F.3d 686 (2d Cir. 1996) 15
Jackson v. *Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) 33
Long Island Care at Home, Ltd. v. *Coke*, 127 S. Ct. 2339 (2007) 31
Lorillard v. *Pons*, 434 U.S. 575 (1978) 18
Mallard v. *United States Dist. Ct.*, 490 U.S. 296 (1989) 20
Mary P. v. *Illinois State Bd. of Educ.*, 919 F. Supp. 1173 (N.D. Ill. 1996) 15
Messersmith v. *American Fid. Co.*, 133 N.E. 432 (N.Y. 1921) 24
National Ass'n of Home Builders v. *Defenders of Wildlife*, 127 S. Ct. 2518 (2007) 18
Pennhurst State Sch. & Hosp. v. *Halderman*, 451 U.S. 1 (1981) 32
Posadas v. *National City Bank*, 296 U.S. 497 (1936) 18
Schaffer v. *Weast*, 546 U.S. 49 (2005) 23
School Comm. of the Town of Burlington v. *Department of Educ.*, 471 U.S. 359 (1985) ..... *passim*
Seattle Sch. Dist. No. 1 v. *B.S.*, 82 F.3d 1493 (9th Cir. 1996) 15

Cases—Continued: Page

United States v. *Mead Corp.*, 533 U.S. 218 (2001) 31
United States v. *Ron Pair Enters., Inc.*, 489 U.S. 235 (1989) 28
United States v. *United Foods, Inc.*, 533 U.S. 405 (2001) 32
Varity Corp. v. *Howe*, 516 U.S. 489 (1996) 19
Watt v. *Alaska*, 451 U.S. 259 (1981) 18
Whitman v. *American Trucking Ass'ns*, 531 U.S. 457 (2001) 31
Winkelman v. *Parma City Sch. Dist.*, 550 U.S. 516 (2007) 3, 20, 22, 23, 27, 32

Constitution, statutes and rule:

U.S. Const. Art. I, § 1, Cl. 1 (Spending Clause) .. 10, 32, 33
Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 101, 111 Stat. 63 4
Individuals with Disabilities Act, 20 U.S.C., 1400 *et seq.* 1
20 U.S.C. 1400(d)(1)(A) 2, 7, 12, 23
20 U.S.C. 1401(9)(A) 2
20 U.S.C. 1401(9)(C) 26
20 U.S.C. 1401(29) 2, 22
20 U.S.C. 1406 ..... 1, 30
20 U.S.C. 1406(a) 31
20 U.S.C. 1412(a)(1)(A) ..... *passim*
20 U.S.C. 1412(a)(1)(B)(i) 21
20 U.S.C. 1412(a)(1)(B)(ii) 21
20 U.S.C. 1412(a)(3)(A) 2, 21

Statutes and rule—Continued: Page

20 U.S.C. 1412(a)(4) 2, 3, 22
20 U.S.C. 1412(a)(10)(A)(ii) 2, 21
20 U.S.C. 1412(a)(10)(C) ..... *passim*
20 U.S.C. 1412(a)(10)(C)(i) 4, 16, 18, 29
20 U.S.C. 1412(a)(10)(C)(ii) ..... *passim*
20 U.S.C. 1412(a)(10)(C)(iii) 4, 17, 28, 29
20 U.S.C. 1414 3
20 U.S.C. 1414(d) 2, 3, 22
20 U.S.C. 1415 3
20 U.S.C. 1415(b)(6)(A) 3
20 U.S.C. 1415(f) 6
20 U.S.C. 1415(f)(1)(A) 3
20 U.S.C. 1415(f)(3)(A) 3
20 U.S.C. 1415(i)(1) 3
20 U.S.C. 1415(i)(2)(A) 3
20 U.S.C. 1415(i)(2)(B)(iii) 30
20 U.S.C. 1415(i)(2)(C)(iii) ..... *passim*
20 U.S.C. 1415(m) 7
Or. Dep't of Educ. Admin. R. for Special Educ. 581-015-2325 (2007) <http://www.ode.state.or.us/policy/federal/idea/policyproced/section07ref.doc> ... 7

Miscellaneous:

143 Cong. Rec. 8013 (1997) 29
64 Fed. Reg. 12,602 (1999) 1, 30

Miscellaneous—Continued: Page

71 Fed. Reg. 46,599 (2006) 1, 30, 31
H.R. Rep. No. 95, 105th Cong., 1st Sess. (1997) 28, 29

In the Supreme Court of the United States

No. 08-305

FOREST GROVE SCHOOL DISTRICT, PETITIONER

v.

T.A.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether the Individuals with Disabilities Education Act (IDEA or Act), 20 U.S.C. 1400 *et seq.*, permits an award of private-school tuition reimbursement when a child with a disability has been denied a free appropriate public education, but has not "previously received special education and related services under the authority of a public agency," 20 U.S.C. 1412(a)(10)(C)(ii). The Secretary of Education administers IDEA and has the authority to promulgate regulations to ensure compliance with the Act. 20 U.S.C. 1406. In commentary accompanying final regulations, the Secretary has taken the position that IDEA authorizes tuition reimbursement in such circumstances. 71 Fed. Reg. 46,599 (2006); 64 Fed. Reg. 12,602

(1999). The United States therefore has a substantial interest in the question presented. The United States participated as an *amicus curiae* in *Board of Education* v. *Tom F.*, 128 S. Ct. 1 (2007), a case raising the same question.

STATEMENT

1. IDEA provides federal grants to States to fund special education and related services for children with disabilities, and it conditions those grants on compliance with specific standards and procedures. The Act requires recipients of federal funding to ensure that "[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21." 20 U.S.C. 1412(a)(1)(A); see 20 U.S.C. 1400(d)(1)(A). A "free appropriate public education" must include the special education and related services necessary to meet each child's unique needs. See 20 U.S.C. 1412(a)(4), 1414(d); see also *Board of Educ.* v. *Rowley*, 458 U.S. 176, 200-203 (1982). Those services must be "provided at public expense," 20 U.S.C. 1401(9)(A), and "at no cost to parents," 20 U.S.C. 1401(29).

The Act "contemplates that [special] education will be provided where possible in regular public schools," but it "provides for placement in private schools at public expense where this is not possible." *School Comm. of the Town of Burlington* v. *Department of Educ.*, 471 U.S. 359, 369 (1985) (*Burlington*). The Act also contains a "child find" provision that requires States to ensure that "[a]ll children with disabilities residing in the State, including * * * children with disabilities attending private schools," are "identified, located, and evaluated." 20 U.S.C. 1412(a)(3)(A); see 20 U.S.C. 1412(a)(10)(A)(ii).

IDEA allows the parents of a child with a disability to participate in decisions regarding the child's education, and it gives them important procedural rights. See 20 U.S.C. 1414, 1415; see also *Winkelman* v. *Parma City Sch. Dist.*, 550 U.S. 516, 524-526 (2007). In consultation with the parents, the local school district must develop an individualized education program (IEP) for the child. 20 U.S.C. 1412(a)(4), 1414(d). The IEP sets out the special education and related services that will provide the child a free appropriate public education. If the parents are not satisfied with a proposed IEP, they may file a complaint with the school district or the State "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child," 20 U.S.C. 1415(b)(6)(A), and they are entitled to "an impartial due process hearing" before an administrative hearing officer. 20 U.S.C. 1415(f)(1)(A); see 20 U.S.C. 1415(f)(3)(A) (prescribing qualifications for hearing officers).

Any party aggrieved by a final administrative decision may bring a civil action under IDEA in federal district court or an appropriate state court. 20 U.S.C. 1415(i)(1) and (2)(A). In such an action, the court has broad authority to fashion an equitable remedy by "grant[ing] such relief as the court determines is appropriate." 20 U.S.C. 1415(i)(2)(C)(iii). This Court has held that a court's authority under Section 1415(i)(2)(C)(iii) extends to awarding reimbursement of private-school tuition when a public school has not provided the required free appropriate public education. *Florence County Sch. Dist. Four* v. *Carter*, 510 U.S. 7, 15-16 (1993); *Burlington*, 471 U.S. at 369-371.

In 1997, Congress amended IDEA and added a provision specifically addressing children in private schools. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 101, 111 Stat. 63; 20 U.S.C. 1412(a)(10)(C). Consistent with this Court's decisions in *Burlington* and *Carter*, Section 1412(a)(10)(C)(i) sets out the "general" rule that a school district is not required to pay the cost of private-school tuition if it "made a free appropriate public education available to the child and the parents elected to place the child in [a] private school." 20 U.S.C. 1412(a)(10)(C)(i); see *Burlington*, 471 U.S. at 369; *Carter*, 510 U.S. at 13-14. The Act also states that a court or hearing officer may require a school district to reimburse parents for the cost of private education for a child "who previously received special education and related services under the authority of a public agency," if "the court or hearing officer finds that the agency had not made a free appropriate public education available to the child." 20 U.S.C. 1412(a)(10)(C)(ii). Such reimbursement "may be reduced or denied" if the parents have failed to cooperate in the IEP process, failed to provide timely notice of their intention to enroll the child in a private school, or otherwise behaved unreasonably. 20 U.S.C. 1412(a)(10)(C)(iii).

2. Petitioner is a school district in Washington County, Oregon. Respondent attended public schools in the district from kindergarten until the spring of his junior year in high school. Pet. App. 2a. He had substantial academic difficulties, but he passed from grade to grade, in part because of significant at-home help from his parents. *Ibid.*; see *id.* at 61a-62a.

In December 2000, when respondent was in ninth grade, his guidance counselor suspected that he might

have a learning disability. Pet. App. 2a. In January and February 2001, the school staff conducted two meetings at which respondent's parents were not present. *Id.* at 3a. Notes from those meetings indicate that the staff suspected respondent might have attention deficit hyperactivity disorder (ADHD). *Ibid.* No one from the school informed respondent's parents of their suspicions about ADHD. *Ibid.* Instead, respondent was evaluated by psychologists and educational specialists to determine if he had any learning disabilities (but not ADHD), and they concluded that he did not. *Ibid.*; *id.* at 3a n.1. A school official advised respondent's mother "to take a 'wait and see' approach," because "many boys had similar problems but started 'turning around' in their sophomore or junior years." *Id.* at 73a.

In the summer of 2001, respondent's mother emailed school officials to express her concern that respondent "apparently cannot process information or learn from the teaching methods used thus far" and to suggest that "there must be some method of teaching more appropriate for him." J.A. 104. Petitioner provided no assistance in response to that request. Pet. App. 74a. That fall, respondent began the tenth grade. After his first progress report showed that he was failing tests, his mother again contacted school officials, who told her that respondent could be referred for further evaluation, "but it would be difficult to find him eligible" for special education services. *Id.* at 77a-78a.

Respondent continued to fall behind in school. Pet. App. 81a. In 2002, he began using marijuana. *Id.* at 86a. Respondent's parents took him to a psychologist, and in March 2003 (during respondent's junior year), the psychologist diagnosed him with "ADHD, depression, math disorder, and cannabis abuse" and recommended that he

be admitted to a residential program. *Id.* at 4a. Respondent's parents then removed him from public school, and, after first sending him to a privately run three-week wilderness therapy program, they enrolled him in Mount Bachelor Academy, a private residential school that specializes in children with a variety of problems, including learning disabilities, substance abuse, and behavioral problems. *Ibid.*

3. Thereafter, respondent's parents requested a due process hearing under 20 U.S.C. 1415(f). Pet. App. 5a. The administrative hearing began in May 2003, but it was continued to allow school officials to evaluate respondent, which they did extensively in the summer of 2003, with his parents' full cooperation. *Ibid.* Although the evaluation team acknowledged respondent's learning difficulties and accepted the diagnosis of ADHD, a majority of the team concluded that his disabilities were insufficiently severe to entitle him to special education. *Ibid.* The administrative hearing resumed in September 2003, and both parties submitted evidence. *Ibid.*

In January 2004, the hearing officer issued a lengthy opinion finding that respondent had ADHD and that his condition was a qualifying disability under IDEA. Pet. App. 58a, 133a-141a. The hearing officer concluded that petitioner had failed to provide respondent with a free appropriate public education, that Mount Bachelor was an appropriate placement for respondent, and that respondent's parents were entitled to reimbursement for his tuition. *Id.* at 58a-60a, 150a-154a.

4. Petitioner brought this action in the United States District Court for the District of Oregon, seeking review

of the hearing officer's decision.[1] The district court reversed the hearing officer's award of tuition reimbursement. Pet. App. 25a-55a. The court adopted all of the hearing officer's findings of fact, *id.* at 44a, but it concluded that, under 20 U.S.C. 1412(a)(10)(C)(ii), "*only* children who had previously received special education services from [a public school] are even eligible for * * * tuition reimbursement," Pet. App. 48a-49a. The court also stated that, even if reimbursement were available in extraordinary circumstances for children who had not previously received special education, "[e]quitable considerations would not support tuition reimbursement in this case." *Id.* at 55a.

5. The court of appeals reversed and remanded. Pet App. 1a-24a.

a. The court of appeals adopted the analysis of the Second Circuit's decision in *Frank G.* v. *Board of Education*, 459 F.3d 356 (2006), cert. denied, 128 S. Ct. 436 (2007), which held that 20 U.S.C. 1412(a)(10)(C)(ii) does not categorically prohibit private-school tuition reimbursement for students who have not "previously received special education and related services." Pet. App. 13a. The court explained that interpreting Section 1412(a)(10)(C)(ii) to impose such a categorical prohibition would contravene the express statutory purpose of ensuring "that *all* children with disabilities have avail-

---

[1] Respondent notes (Br. 10 n.1) that although the hearing officer awarded reimbursement to respondent's parents, petitioner named only respondent as a defendant in the district court. Under Oregon law, the parents' rights under IDEA were automatically transferred to respondent when he reached the age of majority in 2003. Or. Dep't of Educ. Admin. R. for Special Educ. 581-015-2325 (2007) <http://www.ode.state.or.us/policy/federal/idea/policyproced/section07ref.doc>; see 20 U.S.C. 1415(m) (permitting such a transfer).

able to them a free appropriate public education." *Id.* at 15a (quoting 20 U.S.C. 1400(d)(1)(A)). The court also observed that such an interpretation "would lead to the absurd result that the parents of a child with a disability must wait (an indefinite, perhaps lengthy period) until the child has received special education in public school before sending the child to an appropriate private school, no matter how uncooperative the school district and no matter how inappropriate the special education." *Id.* at 15a-16a.

The court of appeals went on to hold that the district court's equitable analysis was based on an incorrect legal standard. Pet. App. 17a-18a. Specifically, the district court believed that reimbursement was available "only in *extreme cases* for parents who place their child in private school before receiving special education and related services in public school." *Id.* at 18a. The court of appeals remanded with instructions for the district court to "consider all relevant factors in determining whether to grant reimbursement." *Ibid.*

b. Judge Rymer dissented. Pet. App. 21a-24a. In her view, a free appropriate public education "was not at issue" when respondent's parents withdrew him from public school and "decided to put him in a private school for reasons of their own." *Id.* at 21a-22a.

SUMMARY OF ARGUMENT

When a child with a disability has been denied a free appropriate public education, IDEA authorizes an award of private-school tuition reimbursement regardless of whether the child previously received public special education.

IDEA guarantees a free appropriate public education for "all children with disabilities." 20 U.S.C.

1412(a)(1)(A). As this Court has twice unanimously held, IDEA's broad "appropriate" relief provision—which directs a court to "grant such relief as [it] determines is appropriate," 20 U.S.C. 1415(i)(2)(C)(iii)—authorizes a court to award private-school tuition reimbursement when the parents of a child with a disability unilaterally place their child in a private school pending a proceeding in which they prove that the child was denied a free appropriate public education. *Florence County Sch. Dist. Four* v. *Carter*, 510 U.S. 7, 15-16 (1993); *School Comm. of the Town of Burlington* v. *Department of Educ.*, 471 U.S. 359, 369 (1985). A contrary conclusion, the Court has explained, would require parents to "go along with the [offered public education] to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement," and that Hobson's choice would deprive children with disabilities of the Act's central guarantee of a "free appropriate public education." *Id.* at 370.

Petitioner relies on 20 U.S.C. 1412(a)(10)(C)(ii), which was enacted as part of the 1997 amendments to IDEA, and which addresses a common situation in which private-school tuition reimbursement is sought—*i.e.*, for children with disabilities who previously received public special education. But Section 1412(a)(10)(C)(ii) neither expressly nor impliedly eliminates the pre-existing reimbursement remedy for parents of a child who has not previously received public special education. To the contrary, the language of that provision is permissive, not restrictive, and it places no limit on the authority of a court to grant appropriate relief in other circumstances.

Adopting petitioner's interpretation of Section 1412(a)(10)(C)(ii) would contradict the Act's express guarantee of a free appropriate public education to "*all*

children with disabilities" and would conflict with other provisions of the Act that confirm that a State's obligation to provide a free appropriate public education does not depend on a child's prior receipt of public special education. It also would flout the presumption against implied repeals, and it would produce absurd results, especially in cases like this one, where the only reason the child did not receive public special education is that the school district wrongly refused to provide it.

Because the statutory text is clear, there is no need for recourse to legislative history. In any event, the legislative history contains no indication that Section 1412(a)(10)(C) was intended to alter the substantive scope of the Act, or that it restricts the authority of a court to grant "appropriate" relief under Section 1415(i)(2)(C)(iii).

To the extent that the Court concludes that IDEA is ambiguous, it should defer to the Secretary of Education's interpretation. In 1999 and again in 2006, the Secretary stated that the authority to award reimbursement under the Act's "appropriate" relief provision is "independent of" the authority to award reimbursement under Section 1412(a)(10)(C)(ii), and that reimbursement is therefore available in the circumstances at issue here. Those interpretations were expressed in comments accompanying final regulations issued after notice-and-comment procedures, and they are entitled to deference.

Finally, petitioner's Spending Clause argument does not compel a different conclusion. The argument was not raised or passed on below, so it is not properly presented here. In any event, a determination that parents are eligible for reimbursement regardless of whether their child has previously received public special educa-

tion does not require special notice to States, because it does not expand States' substantive obligation to provide a free appropriate public education for "all children with disabilities." Moreover, the IDEA, this Court's precedents, and the Secretary's formal interpretation of the 1997 amendments have provided such notice.

ARGUMENT

PRIVATE-SCHOOL TUITION REIMBURSEMENT MAY BE AWARDED TO THE PARENTS OF A CHILD WHO HAS NOT PREVIOUSLY RECEIVED PUBLIC SPECIAL EDUCATION WHEN THE CHILD HAS BEEN DENIED A FREE APPROPRIATE PUBLIC EDUCATION

Under IDEA, "all children with disabilities"—regardless of whether they are enrolled in public or private school—enjoy the right to a free appropriate public education. 20 U.S.C. 1412(a)(1)(A). The remedial question presented here arises only after an administrative or judicial finding has been made that a child with a disability has been denied a free appropriate public education.

Petitioner contends that IDEA provides no authority to award reimbursement of private-school tuition to any child unless the child previously received public special education. That position is contradicted by the text, structure, and purposes of IDEA, this Court's precedent, and the formal interpretation of the agency charged with implementing the Act. Although a court has discretion to withhold such an award based on equitable considerations in any given case, IDEA contains nothing like the flat-out bar petitioner imports into the statute. To the contrary, it authorizes an award of private-school tuition to the parents of any child denied

a free appropriate public education, including a child who has not previously received public special education.

A. The Plain Text Of IDEA Provides For Reimbursement Of Private-School Tuition When A School District Fails To Provide A Free Appropriate Public Education

1. Section 1415(i)(2)(C)(iii) authorizes awards reimbursing private-school tuition

IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. 1400(d)(1)(A). To that end, IDEA specifies that a State must make a free appropriate public education available to "all children with disabilities residing in the State." 20 U.S.C. 1412(a)(1)(A). When a school district fails to comply with that mandate—either by failing to develop an adequate IEP for a disabled child or, as here, by failing to recognize in the first instance that the child has a disability—IDEA gives parents the right to challenge its decision in an administrative hearing or, if necessary, in court. The Act gives broad remedial authority to the court to "grant such relief as [it] determines is appropriate." 20 U.S.C. 1415(i)(2)(C)(iii).

Although Congress has comprehensively amended IDEA on several occasions, it has not altered Section 1415(i)(2)(C)(iii) in any material way. And this Court has twice unanimously affirmed that Section 1415(i)(2)(C)(iii) authorizes a court "to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act." *School Comm. of the Town of Burlington* v. *Department of Educ.*, 471

U.S. 359, 369 (1985); accord *Florence County Sch. Dist. Four* v. *Carter*, 510 U.S. 7, 15-16 (1993).

In *Burlington*, the father of a child with disabilities unilaterally enrolled the child in a private school after deciding that the school district's proposed placement was inappropriate in light of the child's poor performance under the IEP for the previous year. After a state administrative officer and a federal court agreed that the IEP was inappropriate, the father obtained reimbursement for private-school tuition. In a unanimous decision, this Court held that IDEA's "appropriate" relief provision authorized a court to award such reimbursement. *Burlington*, 471 U.S. at 370.

The Court explained that, without such a remedy, "the child's right to a *free* appropriate public education * * * would be less than complete," *Burlington*, 471 U.S. at 370, and it concluded that "Congress undoubtedly did not intend this result," *ibid.* The Court emphatically rejected the suggestion that IDEA posed a cruel choice to parents of either "go[ing] along with the IEP to the detriment of their child if it turns out to be inappropriate or pay[ing] for what they consider to be the appropriate placement." *Ibid.* At the same time, however, the Court stressed that parents who unilaterally place their children in private school during a pending challenge to a proposed IEP "do so at their own financial risk." *Id.* at 373-374. After all, to obtain reimbursement, parents must prove not only that the services that the child received in the private school were appropriate, but also that the public school's IEP was legally insufficient.

Eight years later, in *Carter*, this Court unanimously reaffirmed *Burlington* and held that "a court may order reimbursement for parents who unilaterally withdraw

their child from a public school that provides an inappropriate education under IDEA." *Carter*, 510 U.S. at 9. There, the parents of a child with a disability removed her from a public school and enrolled her in private school because they were dissatisfied with the school district's IEP, which had been implemented for the last month of the prior year. See *Carter* v. *Florence County Sch. Dist.*, 950 F.2d 156, 159 (4th Cir. 1991). The Court held that tuition reimbursement was authorized even though the private school did not meet state education standards, explaining that construing IDEA "to bar reimbursement in the circumstances of this case would defeat th[e] statutory purpose" of "ensur[ing] that children with disabilities receive an education that is both appropriate and free." *Carter*, 510 U.S. at 13-14.

The Court dismissed the school district's concerns about the financial burden of allowing reimbursement. *Carter*, 510 U.S. at 15-16. It pointed out that public schools can avoid the financial burden of reimbursement by simply "giv[ing] the child a free appropriate public education in a public setting, or plac[ing] the child in an appropriate private setting of the State's choice." *Id.* at 15. "This is IDEA's mandate," this Court explained, "and school officials who conform to it need not worry about reimbursement claims." *Ibid.*

Burlington and *Carter* underscore that Section 1415(i)(2)(C)(iii)'s broad remedial provision, including its reimbursement component, is integral to ensuring that eligible children receive an education that is both free and appropriate. Although *Burlington* and *Carter* both involved children with disabilities who had received some public special education before their parents became dissatisifed and opted for private school, neither decision suggests that a child's receipt of such services

is relevant to the reimbursement determination, much less that it constitutes a threshold condition for reimbursement. Indeed, following *Burlington*, lower courts routinely awarded reimbursement to parents of children who had not previously received public special education. See, *e.g.*, *Gadsby* v. *Grasmick*, 109 F.3d 940 (4th Cir. 1997); *Seattle Sch. Dist. No. 1* v. *B.S.*, 82 F.3d 1493 (9th Cir. 1996); *Mary P.* v. *Illinois State Bd. of Educ.*, 919 F. Supp. 1173 (N.D. Ill. 1996); *Ivan P.* v. *Westport Bd. of Educ.*, 865 F. Supp. 74 (D. Conn. 1994), aff'd, 101 F.3d 686 (2d Cir. 1996) (Table); *Edwards-White* v. *District of Columbia*, 785 F. Supp. 1022 (D.D.C. 1992).

2. Nothing in Section 1412(a)(10)(C) precludes an award of private-school tuition to the parents of a child who did not previously receive public special education

Congress amended IDEA in 1997. Although Congress left the Act's "appropriate" relief provision unchanged, it added a new provision, Section 1412(a)(10)(C), addressing tuition reimbursement for parents of some children with disabilities who are enrolled in private schools. According to petitioner (Br. 26), Section 1412(a)(10)(C)(ii) "unambiguously" imposes a "categorical bar" to reimbursement where a child has not previously received special education from a public agency. Petitioner is incorrect.

a. Petitioner's interpretation is contradicted by the text of Section 1412(a)(10)(C)(ii) itself. There is nothing restrictive about Section 1412(a)(10)(C)(ii) at all. To the contrary, it is phrased permissively. The provision states that if the "parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll

the child" in private school without the consent of the public agency, then "a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if * * * the agency had not made a free appropriate public education available to the child in a timely manner." 20 U.S.C. 1412(a)(10)(C)(ii). The provision does not say that a court may grant such relief only in those circumstances, nor does it say that a court may not grant such relief in other circumstances. Petitioner's interpretation requires the Court to insert limiting language and a limiting concept into Section 1412(a)(10)(C)(ii) that Congress did not employ. See *Hanover Bank* v. *Commissioner*, 369 U.S. 672, 687 (1962) ("[W]e are not at liberty * * * to add to or alter the words employed to effect a purpose which does not appear on the face of the statute.").

b. Petitioner's reading is also inconsistent with the surrounding provisions in Section 1412(a)(10)(C). Significantly, the Subsection immediately preceding Section 1412(a)(10)(C)(ii)—titled "In general"—reaffirms (as noted in *Burlington* and *Carter*) that a public agency is not required to pay for the tuition "of a child with a disability at a private school * * * if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school." 20 U.S.C. 1412(a)(10)(C)(i); see *Burlington*, 471 U.S. at 369; *Carter*, 510 U.S. at 13-14. That Subsection, unlike the one on which petitioner relies, expressly limits the circumstances in which an agency must reimburse private-school tuition. It underscores that parents who opt for private school bear the risk that an adjudicator might determine that the proposed IEP that they rejected actually satisfied IDEA. And it creates a safe harbor for school districts by guaranteeing that, so

long as they make available a free appropriate public education, they will not incur any obligation to reimburse private-school tuition.

Subsections (C)(ii) and (C)(iii) elaborate the "general" rule of Subsection (C)(i) by addressing the common situation in which a school district provides some special education and related services, but the parents believe that those services are inadequate. In that situation, Subsection (C)(ii) identifies conditions under which reimbursement "may" be required—*i.e.*, if the school district "had not made a free appropriate public education available." Conversely, Subsection (C)(iii) identifies conditions under which reimbursement "may be reduced or denied"—*i.e.*, if the parents fail to cooperate in the IEP process, fail to provide timely notice of their intention to enroll the child in a private school, or otherwise behave unreasonably. Thus, when a child is receiving special education, Subsections (C)(ii) and (C)(iii) work together to encourage both the school district and the parents to cooperate in developing and implementing an IEP that will provide a free appropriate public education.

Petitioner's interpretation would wrench Subsection (C)(ii) from its context. It would create an additional, and potentially much larger, safe harbor for school districts, allowing them to avoid any obligation to reimburse private-school tuition simply by refusing to provide special education and related services themselves —no matter how much a child needs those services and is entitled to them under IDEA. Particularly in light of *Burlington*, *Carter*, and the broad statutory authorization for equitable relief, what petitioner's argument requires to succeed is not the language of Subsection (C)(ii), which authorizes reimbursement of tuition in a

different context, but language that expressly denies the availability of reimbursement in the circumstances of this case. The absence of any such restrictive language in Subsection (C)(ii) is underscored by the use of language expressly precluding tuition reimbursement in circumstances (described in Subsection (C)(i)) that all parties agree are not present here.

3. Petitioner's interpretation of Section 1412(a)(10)(C)(ii) disregards the canon against implied repeals

Well before the 1997 amendments to IDEA, *Burlington* and *Carter* made clear that Section 1415(i)(2)(C)(iii) grants courts the authority to order reimbursement to parents in respondent's circumstances. Petitioner's argument depends on the notion that Section 1412(a)(10)(C)(ii) impliedly repealed part of the authority conferred by Section 1415(i)(2)(C)(iii). But Congress is presumed to have been aware of this Court's interpretation of Section 1415(i)(2)(C)(iii) and to have endorsed it by reauthorizing and amending the statute while leaving the relevant language unchanged. See *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978).

This Court has repeatedly held that "'repeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.'" *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007) (brackets in original) (quoting *Watt* v. *Alaska*, 451 U.S. 259, 267 (1981)). As the Court has emphasized, "[a]n implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch* v. *Smith*, 538

U.S. 254, 273 (2003) (quoting *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936)). Neither of those conditions is close to satisfied here.

Giving effect to this Court's interpretation of IDEA's "appropriate" relief provision creates no "irreconcilable conflict" with Section 1412(a)(10)(C)(ii). As explained above, Section 1412(a)(10)(C)(ii) is phrased in permissive terms and addresses the standards that govern one specific situation in which reimbursement claims commonly arise: when parents are dissatisfied with the special education their child is receiving in a public school and place the child in a private school in pursuit of a more appropriate education. Recognizing that courts retain their authority under Section 1415(i)(2)(C)(iii) to grant reimbursement to parents in other situations in no way conflicts with Section 1412(a)(10)(C)(ii). Likewise, because Section 1412(a)(10)(C)(ii) does not "cover[] the whole subject" of tuition reimbursement addressed by the "appropriate" relief provision, there is no basis for concluding that the newer section was intended, much less "clearly intended," to operate as a "substitute" for the relief provision. *Branch*, 538 U.S. at 273.

Petitioner suggests (Br. 31-32) that Section 1412(a)(10)(C)(ii) displaces the general remedial authority conferred by Section 1415(i)(2)(C)(iii) because it is a more specific provision. But the canon that the specific controls the general operates "as a warning against applying a general provision when doing so would undermine limitations created by a more specific provision." *Varity Corp.* v. *Howe*, 516 U.S. 489, 511 (1996). Allowing respondent to invoke IDEA's "appropriate" relief provision does not undermine any "limitation" created by Section 1412(a)(10)(C)(ii), because that provision imposes no limitations at all.

Nor is Section 1412(a)(10)(C)(ii) made superfluous if it is not an implied repeal. As this Court has explained, "[s]tatutory provisions may simply codify existing rights or powers." *Mallard* v. *United States Dist. Ct.*, 490 U.S. 296, 307 (1989). Here, Section 1412(a)(10)(C)(ii) codifies the right to pursue reimbursement in one specific and potentially troublesome situation, presented in both *Burlington* and *Carter*. In any event, to the extent that there is some overlap between the relief available under Section 1412(a)(10)(C)(ii) and that under Section 1415(i)(2)(C)(iii), such a result is neither problematic nor unusual. As this Court has explained, "[r]edundancies across statutes are not unusual events in drafting," and courts should give effect to all provisions absent a "positive repugnancy." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992) (internal quotation marks omitted). No such repugnancy exists here.

4. Petitioner's reading ignores key provisions of IDEA and is inconsistent with the overall structure of the Act

Petitioner's interpretation is not only unsupported by Section 1412(a)(10)(C) but also inconsistent with other provisions of IDEA. As this Court has explained, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989); see *Winkelman* v. *Parma City Sch. Dist.*, 550 U.S. 516, 523 (2007) ("[A] proper interpretation of [IDEA] requires a consideration of the entire statutory scheme."). Petitioner's position conflicts with several parts of the Act.

First, and most fundamentally, petitioner's reading contravenes IDEA's central guarantee of providing a free appropriate education to "*all* children with disabilities." 20 U.S.C. 1412(a)(1)(A) (emphasis added). Congress set out only two "[l]imitation[s]" on that obligation, one relating to children "aged 3 through 5 and 18 through 21" where the obligation would conflict with State law or practice, 20 U.S.C. 1412(a)(1)(B)(i), and the other relating to incarcerated persons, 20 U.S.C. 1412(a)(1)(B)(ii). Neither limitation is applicable here, and there is no basis for creating an additional exception.

As this Court has recognized, denying tuition reimbursement to the parents of a child who is unilaterally enrolled in private school because of the inadequacy of an IEP would make "the child's right to a *free* appropriate public education * * * less than complete." *Burlington*, 471 U.S. at 370; see *id.* at 372 (forcing parents to choose between subjecting a child with a disability to an inappropriate placement or obtaining an appropriate placement at the expense of "sacrificing any claim for reimbursement" would deny parents the Act's right to "both an appropriate education and a free one"). That is true *a fortiori* where the IEP is not inadequate but nonexistent—where, that is, the parents have enrolled the child in a private school because the school district has failed to recognize that the child is disabled and therefore has not proposed any IEP at all.[2]

---

[2] Petitioner's reading is also at odds with IDEA's child-find requirement. The Act does not treat previously unserved students as second-class citizens. To the contrary, it obligates States to identify, locate, and evaluate "[a]ll children with disabilities residing in the State, including children with disabilities * * * attending private schools." 20 U.S.C. 1412(a)(3)(A); see 20 U.S.C. 1412(a)(10)(A)(ii). The purpose

This Court recently observed that it found "nothing in [IDEA] to indicate that when Congress required States to provide adequate instruction to a child 'at no cost to parents,' it intended that only some parents would be able to enforce that mandate." *Winkelman*, 550 U.S. at 533 (quoting 20 U.S.C. 1401(29)). The Court therefore refused to adopt a reading of the statute that would "leave[] some parents without a remedy." *Id.* at 532. Petitioner's reading of Section 1412(a)(10)(C)(ii) would do just that, because it would deprive one class of parents—those whose children have not previously received public special education and related services—of a reimbursement remedy even when a court finds that a school district wrongfully withheld those very services and so denied their children an appropriate public education.

Second, and more generally, petitioner's reading conflicts with the elaborate substantive and procedural requirements of IDEA that are aimed at ensuring that all children with disabilities actually receive a free appropriate education. Under the statute, school districts must identify each disabled child and, in consultation with parents, develop an IEP setting out the special education and related services that will meet that child's unique educational needs. 20 U.S.C. 1412(a)(4), 1414(d); see *Winkelman*, 550 U.S. at 523-526 (detailing parents'

---

of finding such previously unserved children is to ensure that the State makes available to them a free appropriate education. Petitioner's interpretation would have the States seek such students out, but then deny them a free appropriate education, through the mechanism of tuition reimbursement, unless their parents were first willing to subject them to demonstrably inadequate public special education. In *Burlington*, this Court observed that imposing such a choice on parents would contravene the Act's basic guarantees. 471 U.S. at 370.

procedural rights); see also *Schaffer* v. *Weast*, 546 U.S. 49, 51-53 (2005). Under petitioner's theory, a court might find that a school district had deprived a child of appropriate services and that a private school would provide those services, and yet lack the power to order relief ensuring a "free and appropriate" education. This result contravenes the entire structure of IDEA.

B. Petitioner's Interpretation Produces Perverse Consequences

As explained above, adopting petitioner's reading of Section 1412(a)(10)(C)(ii) would frustrate IDEA's express purpose of "ensur[ing] that all children with disabilities have available to them a free appropriate public education." 20 U.S.C. 1400(d)(1)(A). Indeed, when considered in light of IDEA's broad objectives, petitioner's reading would produce perverse results, and it should be rejected for that reason. See, *e.g.*, *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 509-511 (1989); *id.* at 527 (Scalia, J., concurring in the judgment); *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); see also *Winkelman*, 550 U.S. at 531 (interpreting IDEA to avoid "incongruous results").

1. Petitioner's reading means that reimbursement can never be available to parents if a school district wrongly refuses to identify their child as having a covered disability. As the court of appeals observed, "if the school district declined to recognize a student as disabled—as occurred in this case—the student would *never* receive special education in public school and therefore would *never* be eligible for reimbursement." Pet. App. 16a. That result would be astonishing, especially given that relief under IDEA is governed by "equitable considerations," *Burlington*, 471 U.S. at 374, and

a familiar principle of equity holds that a party may not profit from its own wrong, see *Glus* v. *Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232-233 (1959); *Messersmith* v. *American Fid. Co.*, 133 N.E. 432, 433 (N.Y. 1921) (Cardozo, J.). No one disputes that respondent's parents might be entitled to reimbursement if petitioner had recognized respondent's disability and provided him with a modicum of special education. Petitioner's wrongful refusal even to acknowledge a child's disability cannot be thought to eliminate this avenue of relief. Petitioner violated the Act by failing to give respondent a free appropriate public education; that it also violated the Act by failing to recognize respondent's disability should not allow it to escape the obligation to reimburse private-school tuition that it otherwise would bear.

Petitioner contends (Br. 38-39) that it is unlikely that "the circumstances hypothesized by" the court of appeals "would come to pass." But the circumstances described by the court of appeals are not hypothetical; they are essentially the facts of this case. Respondent left public school and enrolled at Mount Bachelor in March 2003. Pet. App. 5a. His parents sought an administrative hearing in April 2003, and the hearing officer did not issue a decision until January 2004. *Id.* at 5a-6a. The district court did not issue its decision until May 2005, almost a year after respondent had completed high school. *Id.* at 55a.

In petitioner's view, respondent should have languished in public school—where he was not receiving an appropriate education—until litigation over his eligibility for special education was completed. This Court rejected just such a theory in *Burlington*. There, the Court acknowledged that "[i]f the administrative and judicial review under the Act could be completed in a

matter of weeks," then prospective injunctive relief might be sufficient. *Burlington*, 471 U.S. at 370. But it went on to observe, in language fully applicable here, that "[a]s this case so vividly demonstrates, * * * the review process is ponderous." *Ibid.* Even expedited administrative and judicial proceedings will take weeks or months during what may be a critical period in the development of a disabled child. While those proceedings run their course, petitioner would put parents to a choice of leaving the child in an inappropriate placement or paying for an appropriate placement in a private school. Under that regime, the child's right to a free and appropriate education "would be less than complete." *Ibid.*

2. In addition, under petitioner's reading, if a school district does recognize a child as disabled but proposes a patently inadequate IEP, the parents must nevertheless subject their child to the inappropriate program just to qualify for reimbursement. One district court has suggested that the problem of having to place a disabled child in an inappropriate program could be alleviated by placing the child in that program for "as short a period as one day." *Baltimore City Bd. of Sch. Comm'rs* v. *Taylorch*, 395 F. Supp. 2d 246, 250 (D. Md. 2005). But that holding only highlights the potential absurdities that flow from petitioner's position.

Appropriate education during a child's formative years is critical to a child's development. Moving a child from one school to another can be highly disruptive to a child, both educationally and psychologically. That is true for any youth; it may be especially true for a child with a disability. It would be absurd to conclude that Congress created a regime whereby parents would have to compound the educational difficulties their children

have by subjecting them to inappropriate schools merely to qualify for tuition reimbursement.

3. Petitioner's interpretation of Section 1412(a)(10)(C)(ii) would generate other perverse results. Under IDEA, a school district's responsibility to provide educational services generally begins at age three. 20 U.S.C. 1412(a)(1)(A); see 20 U.S.C. 1401(9)(C) (defining "free appropriate public education" to include "an appropriate *preschool*, elementary school, or secondary school education") (emphasis added). But Section 1412(a)(10)(C)(ii) addresses reimbursement only for children enrolled in "a private elementary school or secondary school." Thus, if petitioner were correct that Section 1412(a)(10)(C)(ii) identifies the only circumstances in which a court may grant tuition reimbursement, IDEA would not permit reimbursement to the parents of any child over the age of three who attends a preschool program. Under petitioner's restrictive reading, that would be true even if the preschooler had previously received inadequate special education under public authority.

In addition, petitioner's theory would deny reimbursement for private tutoring and similar expenses incurred by the parents of a child who remains in public school. For example, if a child with a disability were receiving special education and related services from a public school, but the parents felt that additional services were needed, the parents might challenge the level of services the public school provided—say, one hour of speech therapy per week rather than four. During the pendency of the administrative or judicial proceedings, they might obtain the additional three hours from a private source. Section 1412(a)(10)(C)(ii) addresses only the case in which a child is "enroll[ed] * * * in a pri-

vate elementary school or secondary school." If it is the exclusive avenue for reimbursement of private educational expenses, then even if a court later determined that the additional three hours should have been provided, the parents would be statutorily ineligible for reimbursement.

In each of these circumstances, as in this case, petitioner's interpretation would deprive a child of a free and appropriate education when all the fault lay with the public school. That interpretation would permit schools to impose the burden of their failures on children and their parents, a result that this Court soundly rejected in *Burlington* and *Carter*.

4. Petitioners argue (Br. 40) that denying reimbursement in these circumstances is necessary to avoid creating an "incentive for parents to preemptively enroll a child in private school, without engaging the district regarding whether and, if so, what type of special education would be available." But parents who unilaterally place their children in private school "do so at their own financial risk." *Carter*, 510 U.S. at 15 (quoting *Burlington*, 471 U.S. at 374). That provides a substantial practical check on abusive or manipulative conduct. As Justice Scalia recently explained, "[a]ctions seeking reimbursement are less likely to be frivolous, since not many parents will be willing to lay out the money for private education without some solid reason to believe the [public education] was inadequate." *Winkelman*, 550 U.S. at 543 (Scalia, J., concurring in the judgment in part and dissenting in part). Moreover, even after a violation of IDEA is established, courts have broad equitable discretion in determining what relief is "appropriate," and they may take into account the actions of parents—including any precipitous or preemptive action on

their part—in determining "the appropriate and reasonable level of reimbursement that should be required." *Carter*, 510 U.S. at 15-16; see *Burlington*, 471 U.S. at 374; *id.* at 366-367.

C. The Legislative History Does Not Support Petitioner's Interpretation

Because the language of Section 1415(i)(2)(C)(iii) is clear, there is no need for recourse to the legislative history. See *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 240-241 (1989). In any event, petitioner's arguments based on the legislative history (Br. 25-27) are unpersuasive.

Significantly, despite numerous hearings and debates on the 1997 amendments, there is no evidence in the legislative record that Congress intended to cut back on the Act's "appropriate" relief provision or that it disagreed with the rationale of *Burlington* or *Carter*. That "dog that did not bark" bolsters the conclusion that Congress did not intend Section 1412(a)(10)(C) to remove an important part of the district courts' remedial authority. *Chisom* v. *Roemer*, 501 U.S. 380, 396 n.23 (1991).

To the contrary, the House Report supports the conclusion that Section 1412(a)(10)(C)(ii) and (iii) were intended not to restrict a court's authority to order reimbursement, but simply to set out appropriate criteria to be applied in one specific situation. In introducing the amendments' treatment of the reimbursement remedy, the report discusses the criteria to be used when deciding whether the remedy is appropriate, and it makes no mention of whether the child had previously received services from the public agency. H.R. Rep. No. 95, 105th Cong., 1st Sess. 91-92 (1997) (*1997 House Rep.*).

Petitioner relies on a later passage in which the report observes that "[p]reviously, the child must have had received special education and related services under the authority of a public agency." Br. 26 (quoting *1997 House Rep.* 93). The meaning of that cryptic and ungrammatical sentence is not obvious, but it is most naturally read as a description of prior law (albeit an inaccurate one), not of the intended future effect of the amendments. In any event, the sentence does not state that Section 1412(a)(10)(C)(ii) is the only provision under which the remedy of reimbursement might be obtained, and it gives no indication of an intent to eliminate the remedies this Court had already recognized as available under Section 1415(i)(2)(C)(iii).

Petitioner also relies on a floor statement to the effect that the 1997 amendments would "make[] it harder for parents to unilaterally place a child in elite private schools at public taxpayer expense." Br. 25 (quoting 143 Cong. Rec. 8013 (1997) (statement of Rep. Castle)). There is no dispute that the safe harbor of Section 1412(a)(10)(C)(i) does just that. So too does Section 1412(a)(10)(C)(iii), which permits courts to reduce or deny reimbursement in cases where parents fail to cooperate with the IEP process. But nothing in the statement suggests that Section 1412(a)(10)(C) imposes a categorical bar to tuition reimbursement when children have not previously received public special education.

D. The Formal Position Of The Agency Charged With Implementing IDEA Is Entitled To Deference

For the reasons discussed above, IDEA authorizes reimbursement of private-school tuition when a school district has failed to provide a free appropriate public education, whether or not the child previously received

special education under the authority of a public agency. To the extent that the Court has any doubt as to that conclusion, however, it should defer to the considered views of the Secretary of Education, the official charged with implementing the Act. *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984); see 20 U.S.C. 1406.

In 1999, the Secretary adopted regulations implementing the 1997 amendments to IDEA. In commentary accompanying the final regulations, the Secretary directly addressed the question presented here, stating:

> [H]earing officers and courts retain their authority, recognized in *Burlington* and [*Carter*] to award "appropriate" relief if a public agency has failed to provide [a free appropriate public education], including reimbursement and compensatory services, under [20 U.S.C. 1415(i)(2)(B)(iii)] in instances in which the child has not yet received special education and related services. This authority is independent of their authority under [20 U.S.C. 1412(a)(10)(C)(ii)] to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency.

64 Fed. Reg. at 12,602.

Similarly, in a 2006 rulemaking, the Secretary rejected a proposal to adopt regulations foreclosing reimbursement in cases where a child had not first received public special education. 71 Fed. Reg. at 46,599. Instead, in commentary accompanying the final rule, the Secretary explained that she did "not believe it [was] appropriate to include in these regulations a provision relieving a public agency of its obligation to provide tuition reimbursement for a unilateral placement in a private school if the child did not first receive special educa-

tion" from that agency. *Ibid.* And she reiterated that the authority to award tuition reimbursement under Section 1415(i)(2)(C)(iii) is "independent of the court's or hearing officer's authority under [20 U.S.C. 1412(a)(10)(C)(ii)] to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency." 71 Fed. Reg. at 46,599.

The Secretary's interpretation is entitled to deference under *Chevron*. This Court has long recognized that official agency interpretations of a statute formally adopted through notice-and-comment rulemaking, formal adjudication, or some other "relatively formal administrative procedure tending to foster * * * fairness and deliberation" are entitled to *Chevron* deference. *United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001); see *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2349 (2007) (extending deference to agency's interpretation of its regulations contained in an "Advisory Memorandum" because the interpretation "reflects [the agency's] considered views"); *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 477-482 (2001) (applying *Chevron* to agency statements in explanatory preamble to final regulations).

In this case, the Secretary's commentary was the product of a formal process and was issued under the statutory authority to "issue regulations * * * that * * * are necessary to ensure that there is compliance with the specific requirements of this chapter." 20 U.S.C. 1406(a). Petitioner suggests (Br. 34) that the Secretary's interpretation "exceeded the scope of * * * delegated authority under the IDEA," since "nothing in IDEA *specifically* requires" reimbursement in this context. Even if that were correct, it would hardly be a ba-

sis for refusing to defer, since the point of *Chevron* is to give deference to an agency's interpretation when Congress has not "directly spoken to the precise question at issue." 467 U.S. at 842. Because the Secretary's carefully considered interpretation is, at a minimum, reasonable, the Court should defer to it.

E. The Spending Clause Does Not Require A Different Result

Finally, petitioner relies on the Spending Clause (U.S. Const. Art. I, § 8, Cl. 1), arguing that reimbursement cannot be required in this case because IDEA rests on Congress's spending power, which requires that conditions on a State's acceptance of federal funds be set out "unambiguously." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981) (*Pennhurst*). That argument was not raised or passed on below, and this Court should decline to consider it. *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001); see *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). In any event, the argument lacks merit.

This Court has held that the clear-statement requirement of *Pennhurst* applies only when a funding condition would "impose [a] substantive condition or obligation on States they would not otherwise be required by law to observe." *Winkelman*, 550 U.S. at 534. Thus, in *Winkelman*, the Court rejected the argument that Spending Clause principles required Congress to provide clear notice that IDEA grants independent rights to parents, since allowing parents to sue to enforce the IDEA did not "result in a change to the States' statutory obligations." *Ibid.* The same is true here, because IDEA unambiguously imposes on States the substan-

tive obligation to provide a free appropriate public education to "all children with disabilities." 20 U.S.C. 1412(a)(1)(A). Reimbursement of tuition is not an additional obligation; it represents "expenses that [the State] should have paid all along and would have borne in the first instance had it developed a proper IEP." *Burlington*, 471 U.S. at 370-371; see *Carter*, 510 U.S. at 15 (explaining that school districts that "conform to [IDEA] need not worry about reimbursement claims").

Moreover, the text of IDEA and this Court's precedent put States on notice that reimbursement of private-school tuition is available when a school district denies a child with a disability an appropriate public education, regardless of whether the child previously received public special education. In addition, the formal interpretation of the Secretary of Education, published in the *Federal Register*, provided even clearer notice. See pp. 30-31, *supra*. Petitioner challenges the validity of that interpretation (Br. 34-36), but it cannot claim to have lacked notice of it. See *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005) (rejecting a Spending Clause challenge, in part because "[t]he regulations implementing" the statute provided notice to States). What petitioner seeks here is not clear notice, but a windfall in the form of an exception to a long-recognized right to reimbursement under IDEA. Nothing in this Court's Spending Clause jurisprudence supports that result.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ELENA KAGAN
Solicitor General

LORETTA KING
Acting Assistant Attorney General

NEAL KUMAR KATYAL
Deputy Solicitor General

ERIC D. MILLER
Assistant to the Solicitor General

PHILIP H. ROSENFELT
Deputy General Counsel
Department of Education

MARK L. GROSS
KARL N. GELLERT
Attorneys

APRIL 2009

AMICUS CURIAE BRIEF

No. 08-305

IN THE

Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,

Petitioner,

v.

T.A.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF AUTISM SPEAKS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

GARY S. MAYERSON
Director, Autism Speaks Federal Legal Appeals Project
Mayerson & Associates
330 West 38th Street
Suite 600
New York, NY 10018
(212) 265-7200

ROBERT H. PEES
Counsel of Record
SUNISH GULATI
CHRISTOPHER M. EGLESON
CHRISTOPHER J. CLORE
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036
(212) 872-1000

Attorneys for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

PRELIMINARY STATEMENT 2

ARGUMENT 5

I. A FALSE START CAN BE DEVASTATING TO AN AUTISTIC CHILD, BECAUSE IN MANY CASES EARLY INTERVENTION IS THE ONLY HOPE FOR AMELIORATING THE SYMPTOMS OF AUTISM 5

II. MANY PUBLIC SCHOOLS ARE UNABLE TO COPE WITH AUTISM'S GROWING PREVALENCE AND CANNOT PROVIDE APPROPRIATE EDUCATIONAL SERVICES TO AUTISTIC STUDENTS 9

III. CONGRESS DID NOT INTEND TO FORCE PARENTS TO CHOOSE BETWEEN SACRIFICING THEIR CHILD'S DEVELOPMENT OR SACRIFICING THEIR RIGHT TO A FREE EDUCATION 14

A. Parents Must Have An Opportunity To Seek Reimbursement If The Act Is To Accomplish Its Fundamental Goal Of Providing A Free Appropriate Public Education To All Children 16

B. The Competing Rationales Presented By Petitioner's Supporting *Amici* For Limiting Reimbursement To Students Who Have Previously Received Special Education Do Not Square With The Act, Are Not Supported By The Legislative

History, And Would Lead To Harsh And Senseless Results 19

C. Section 1412 Provides Specific Criteria For Granting Or Denying Reimbursement In A Common Set Of Circumstances, So Petitioner's Supporting *Amici* Are Incorrect That Allowing Reimbursement Under § 1415 Would Render § 1412 Superfluous 27

CONCLUSION 29

TABLE OF AUTHORITIES

Cases

A.K. v. *Alexandria City Sch. Bd.*,
484 F.3d 672 (CA4 2007) 12

Bd. of Educ. of Montgomery County v. *S.G.*,
No. 06-1411, 2007 WL 1213213 (CA4 Apr. 25, 2007) 13

Bernardsville Bd. of Educ. v. *J.H.*,
42 F.3d 149 (CA3 1994) 25, 27

D.L. v. *Springfield Bd. of Educ.*,
536 F. Supp. 2d 534 (D.N.J. 2008) 14, 24, 26

Deal v. *Hamilton County Bd. of Educ.*,
392 F.3d 840 (CA6 2004) 14

F.T.C. v. *Anheuser-Busch, Inc.*,
363 U.S. 536 (1960) 20

Florence County Sch. Dist. Four v. *Carter*,
510 U.S. 7 (1993) ..... passim

Frank G. v. *Bd. of Educ. of Hyde Park*,
459 F.3d 356 (CA2 2006) 24, 26

Gabel v. *Bd. of Educ. of Hyde Park Cent. Sch. Dist.*,
368 F. Supp. 2d 313 (S.D.N.Y. 2005) 13

Gadsby v. *Grasmick*,
109 F.3d 940 (CA4 1997) 13

Greenwich Bd. of Educ. v. *Torok*,
No. 03-cv 1407, 2003 WL 22429016 (D. Conn. Oct. 23, 2003) 13

J.H. v. *Henrico County Sch. Bd.*,
326 F.3d 560 (CA4 2003) 8

Johnson v. *Texas*,
509 U.S. 350 (1993) 17

Justin G. v. *Bd. of Educ. of Montgomery County*,
148 F. Supp. 2d 576 (D. Md. 2001) 14

L.B. v. *Nebo Sch. Dist.*,
379 F.3d 966 (CA10 2004) 14

Lee v. *Weisman*,
505 U.S. 577 (1992) 18

Lorillard v. *Pons*,
434 U.S. 575 (1978) 15

Nixon v. *Missouri Mun. League*,
541 U.S. 125 (2004) 24

Ozawa v. *United States*,
260 U.S. 178 (1922) 24

Patricia P. v. *Bd. of Educ.*,
203 F.3d 462 (CA7 2000) 26, 27

Sch. Comm. of Burlington v. *Dep't of Educ. of Mass.*,
471 U.S. 359 (1985) 3, 15, 16, 22

Schaffer v. *Weast*,
546 U.S. 49 (2005) 4, 17

Scott v. *Dist. of Columbia*,
No. 03-1672, 2006 WL 1102839 (D.D.C. Mar. 31, 2006) 13

Solomon-Lane v. *Dist. of Columbia*,
No. 99-cv-2404, 2005 WL 736533 (D.D.C. Mar. 31, 2005) 14

Spielberg v. *Henrico County Pub. Sch.*,
853 F.2d 256 (CA4 1988) 14

United States v. *Am. Trucking Ass'ns*,
310 U.S. 534 (1940) 24

United States v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994) 24

W.G. v. *Bd. of Trs.*,
960 F.2d 1479 (CA9 1992) 14, 24

Winkelman v. *Parma City Sch. Dist.*,
127 S. Ct. 1994 (2007) 4, 16

Statutes

20 U.S.C. § 1400 ..... 16, 20

20 U.S.C. § 1412 ..... passim

20 U.S.C. § 1415 ..... passim

Children's Health Act of 2000, Pub. L. 106-310,
Title I, 114 Stat. 1101 (2000) 18

Combating Autism Act of 2006, Pub. L. 109-416,
120 Stat. 2821 (2006) 18

Education of the Handicapped Act Amendments
of 1990, Pub. L. 101-467, Title I, § 101, Title
IX, § 901(b)(10) to (20), 104 Stat. 1103, 1142,
1143 (1990) 18

Pub. L. 108-446, Title I, 118 Stat. 2647, 2677 &
2682 (2004) 18

Other Authorities

2 Office of Special Educ. and Rehabilitative
Servs., DOE, 26th Annual (2004) Report to
Congress on the Implementation of the
Individuals with Disabilities Education Act 25
(2006) 10

Autism Spectrum Disorder Expert Working
Group, Interagency Autism Coordinating
Committee, National Institute of Mental
Health, HHS, Autism Spectrum Disorders
Roadmap 8 (May 16, 2005) 9, 11

C.B. Ferster, Positive Reinforcement and Behavioral Deficits of Autistic Children, 32 Child Development 437 (1961) 9

Catherine Rice, Prevalence of Autism Spectrum Disorders: Autism and Developmental Disabilities Monitoring Network, Six Sites, United States, 2000, 56 Morbidity and Mortality Weekly Review SS-1 (Feb. 9, 2007) 9

Catherine Rice, Prevalence of Autism Spectrum Disorders—Autism and Developmental Disabilities Monitoring Network, 14 Sites, United States, 2002, 56 Morbidity & Mortality Weekly Report SS-1 (Feb. 9, 2007) 9, 10, 12

Comm. on Educ. Interventions for Children with Autism, Nat'l Research Council, Educating Children with Autism (2001) 6, 7, 11, 26

Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision at 70 (4th ed. 2000) 5

Gina Green, Early Behavioral Intervention for Autism, in Behavioral Intervention for Young Children With Autism: A Manual for Parents and Professionals 29 (Catherine Maurice et al. eds., 1996) 6, 7, 8

H.R. Rep. No. 105-95 ..... 20, 22

John J. McEachin *et al.*, Long-Term Outcome For Children With Autism Who Received Early Intensive Behavioral Treatment, 97 Am. J. Ment. Retard. 359 (1993) 6

Lynn M. Hamilton, Facing Autism (2000) 8

O. Ivar Lovaas, Behavioral Treatment And Normal Educational And Intellectual Functioning In Young Autistic Children, 55 J. Consult. & Clin. Psychol. 3 (1987) 7

Office of Special Educ. and Rehabilitative Servs., DOE, Data Analysis System, 1976-2007 10

S. Rep. No. 105-17 22

S. Rep. No. 109-318 ..... 5, 8, 10

Sandra L. Harris *et al.*, Changes In Cognitive And Language Functioning Of Preschool Children With Autism, 21 J. Autism Dev. Disord. 281 (1991) 7

Tristram Smith & O. Ivar Lovaas, Intensive And Early Behavioral Intervention With Autism: The UCLA Young Autism Project, 10 Infants & Young Children 67 (1998) 8

Tristram Smith *et al.*, Intensive Behavioral Treatment For Preschoolers With Severe Mental Retardation And Pervasive Developmental Disorder, 102 Am. J. Ment. Retard. 238 (1997) 7

In the Supreme Court of the United States

No. 08-305

FOREST GROVE SCHOOL DISTRICT, PETITIONER

v.

T.A.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AUTISM SPEAKS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

Amicus curiae Autism Speaks is the world's largest not-for-profit organization dedicated to autism research, education, and treatment. It has chapters across the United States, Canada, and the United Kingdom, and works with federal, state, and local governments, as well as the U.S. military, to meet the treatment and educational needs of the ever-growing population of children diagnosed with autism. *Amicus*'s experience allows it to elucidate the unique educational challenges that children with autism face and the effect the Court's decision will have on thousands of American families.[1]

[1] No part of this brief was authored by counsel for any party. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. All parties have consented to this filing.

PRELIMINARY STATEMENT

We learn geology the morning after the earthquake, on ghastly diagrams of cloven mountains, up-heaved plains, and the dry bed of the sea.

— Ralph Waldo Emerson, Considerations by the Way, in The Conduct of Life 1088 (1860)

One in 150 children born today will be diagnosed with autism, a disability universally recognized as a pervasive developmental disorder that is amenable to remediation only with intensive and early intervention. Parents cannot let a child with autism languish in the wrong educational program when every passing moment means losing developmental opportunities that can never be regained. Early, intensive educational intervention is thus the only hope for salvaging an autistic child's future. Almost all such children will benefit from the right mix and intensity of services, and many who receive them will be able to join regular classrooms and go on to enjoy independent and productive lives. But the opportunity to help an autistic child with effective programming begins to dwindle at age three. The damage to the child's development if this opportunity is not seized with appropriate and effective programming can never be undone in many cases, so when educational bureaucracies dither or delay or place a child in an inappropriate program, the time lost can mean a life wasted—for the sake of the affected child and his or her family, parents and educators cannot afford to learn geology the morning after the earthquake. There are no second chances.

For more than twenty years, the Individuals with Disabilities Education Act (IDEA) and its predecessor statutes have given courts equitable discretion to

grant "such relief as the court determines is appropriate" when reviewing a school district's treatment of a child with a disability. 20 U.S.C. § 1415(i)(2)(C). In *School Committee of Burlington* v. *Department of Education of Massachusetts*, 471 U.S. 359 (1985), and again in *Florence County School District Four* v. *Carter*, 510 U.S. 7 (1993), this Court held that this grant of equitable authority allows a court to order reimbursement when parents of a learning-disabled child reject a school district's inappropriate placement and then secure and pay for appropriate services themselves.

This remedy is particularly important to the parents of children with autism, because of the early intervention required to treat it. In order to ensure that their children receive appropriate education when they need it, parents of autistic children must sometimes act quickly by placing a child in an effective program rather than wade through a bureaucratic thicket beforehand. This is especially true because autism frequently goes undiagnosed until a child is school-aged, meaning that time is even more of the essence.

And the right to seek reimbursement is further important because autism is being diagnosed at higher and higher rates and demand for effective programming is often outstripping the resources that local governments will dedicate to the problem.

One in 150 children born in the United States will be diagnosed with autism, making it more common among children than Down syndrome, diabetes, cystic fibrosis, and cancer. Autistic children now make up the fastest-growing segment of the population served under the IDEA. And in part because of this growth, there is a nationwide shortage of per-

sonnel with the training necessary to properly educate autistic children, and a corresponding shortage of effective programs. School systems thus often cannot provide—or resist providing—appropriate and effective programs. For parents who live in districts that lack the right programs and which therefore cannot possibly offer an appropriate and effective education to an autistic child, being made to try out an inappropriate placement while the student languishes is a situation that no parent should be required to endure.

This case is only about parents having the right to seek reimbursement. Nothing in the Act requires a court to grant that reimbursement unless the parents prove to the court (see *Schaffer* v. *Weast*, 546 U.S. 49 (2005)) "both that the public placement violated IDEA and that the private school placement was proper under the Act" (*Carter*, 510 U.S., at 15). But where parents place a disabled child in a private program because they are correct in their assessment that the school system has failed to provide an appropriate education, they must have the right to seek reimbursement if the Act is to achieve its "most fundamental" mandate: "the provision of a free appropriate public education to a child with a disability." *Winkelman* v. *Parma City Sch. Dist.*, 127 S. Ct. 1994, 2004 (2007).

ARGUMENT

I. A FALSE START CAN BE DEVASTATING TO AN AUTISTIC CHILD, BECAUSE IN MANY CASES EARLY INTERVENTION IS THE ONLY HOPE FOR AMELIORATING THE SYMPTOMS OF AUTISM

The main symptoms of autism are impaired communication, impaired social function, and repetitive, stereotyped behaviors. Forty percent of children with autism do not talk, and others have difficulty learning to use language for communicative purposes. S. Rep. No. 109-318 (2006), at 2; Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, at 70 (4th ed. 2000) ("DSM-IV-TR"). Most children with autism find it difficult to relate to and socialize with other people. DSM-IV-TR, at 70. For example, autistic children generally have "little to no interest in establishing friendships" and often "fail[] to develop peer relationships." *Ibid.* Those who are interested in friendship often cannot grasp the "conventions of social interaction," have little sense of other people's boundaries, intrude inappropriately in social interaction, and cannot perform basic interpersonal tasks like pointing out objects they find interesting. *Ibid.* Many display a restricted range of interests and are often preoccupied with one narrow interest, such as dates, phone numbers, or radio station call letters. *Ibid.* They depend on predictability and have trouble coping with unexpected changes to their routine: trivial changes like rearranging furniture or changing the dinner silverware can spark a catastrophic reaction. S. Rep. No. 109-318, at 3; DSM-IV-TR, at 71. Children with these

symptoms derive little benefit from ordinary educational classrooms.

Education is the primary and only demonstrably effective treatment for autism.[2] There is "abundant scientific evidence," confirmed by "virtually every study" in the last two decades, that early, intensive instruction in a specially designed remedial program can produce "dramatic improvements for children with autism." Gina Green, Early Behavioral Intervention for Autism, in Behavioral Intervention for Young Children With Autism: A Manual for Parents and Professionals 29, 38 (Catherine Maurice et al. eds., 1996).

One study, for example, found that 13-year-olds who had received early, intensive intervention in younger life scored 30 points higher on an IQ test than a control group. See John J. McEachin *et al.*, Long-Term Outcome For Children With Autism Who Received Early Intensive Behavioral Treatment, 97 Am. J. Ment. Retard. 359, 367-68 (1993). Another found that a single year of early intensive education produced 19-point gains on IQ tests later in life. See

---

[2] See Comm. on Educ. Interventions for Children with Autism (CEICA), Nat'l Research Council (NRC), Educating Children with Autism 12 (2001) ("Education * * * is currently the primary form of treatment in autism."); Green, at 29 (whereas the effectiveness of early, intensive instruction in treating autism has repeatedly been shown, "[n]o other treatment for autism offers comparable evidence of effectiveness.") (citations omitted); Smith & Lovaas, at 68 (educational approaches to the treatment of autism have been empirically validated, but biomedical interventions "appear to do little to alter the outcomes of individuals with autism."); Lovaas, at 3 ("Medically and psychodynamically oriented therapies have not proven effective in altering outcomes.").

Sandra L. Harris *et al.*, Changes In Cognitive And Language Functioning Of Preschool Children With Autism, 21 J. Autism Dev. Disord. 281, 287 (1991). A third concluded that nearly half of autistic children who received the intervention went on to succeed in public school and achieve normal IQ scores, compared with 2% of a control group who did so. See O. Ivar Lovaas, Behavioral Treatment And Normal Educational And Intellectual Functioning In Young Autistic Children, 55 J. Consult. & Clin. Psychol. 3, 7-9 (1987); see also Tristram Smith *et al.*, Intensive Behavioral Treatment For Preschoolers With Severe Mental Retardation And Pervasive Developmental Disorder, 102 Am. J. Ment. Retard. 238, 246-47 (1997) (similar). Overall, early intensive intervention leads to "successful integration in regular schools for many" and "completely normal functioning for some." Green, at 29 (emphasis removed). The alternative may be lifelong dependency, including institutional care that can cost $300,000 per year. Effective programming can usually avoid that result.

But for educational intervention to offer meaningful assistance, it must come early, as the National Institutes of Health, the National Institute of Mental Health, the National Research Council, and the American Academy of Pediatrics all recognize.[3] Con-

---

[3] See Nat'l Inst. of Health, HHS, Autism Spectrum Disorders: Pervasive Developmental Disorders 17 (2007) ("One point that most professionals agree on is that early intervention is important."); Nat'l Inst. of Mental Health, HHS, Report to Congress on Autism (2006) ("Early intervention is critical for affected children to gain maximum benefit from current therapies."); CEICA, at 6 (NRC committee "recommends that educational services begin as soon as a child is suspected of having an autistic spectrum disorder."); American Academy of Pediatrics

gress likewise has emphasized that "children with autism spectrum disorder identified early and enrolled in early intervention programs show significant improvements in their language, cognitive, social, and motor skills, as well as in their future educational attainment and decreased needs for special education services." S. Rep. No. 109-318, at 10. Intervention "should begin as soon as possible, preferably in the preschool years, because young children have not yet fallen as far behind their typically developing peers and may have more neurologic plasticity than older children." Tristram Smith & O. Ivar Lovaas, Intensive And Early Behavioral Intervention With Autism: The UCLA Young Autism Project, 10 Infants & Young Children 67, at 68-69 (1998). During this period "the young, developing brain is very modifiable" (Green, at 39), and "rigorous behavioral therapy modifies the neural circuitry before the condition becomes permanent" (Lynn M. Hamilton, Facing Autism 92 (2000) (citations omitted)). As the child grows older, he or she will "have a far more difficult time learning the skills that he needs to function in life." *J.H.* v. *Henrico County Sch. Bd.*, 326 F.3d 560, 565 (CA4 2003).

And time is especially precious because autism is often diagnosed late. Though symptoms usually manifest by age three, and are sometimes evident almost from birth, they are often overlooked or mistaken for emotional disturbance, mental retardation or deafness. See S. Rep. No. 109-318, at 3, 9; Autism

---

Committee on Children With Disabilities, Technical Report: The Pediatrician's Role in the Diagnosis and Management of Autistic Spectrum Disorder in Children, 107:5 Pediatrics 85 (May 2001).

Spectrum Disorder Expert Working Group, Interagency Autism Coordinating Committee, National Institute of Mental Health, HHS, Autism Spectrum Disorders Roadmap 8 (May 16, 2005) ("Roadmap"). The median age of diagnosis is between 52 and 56 months nationwide and up to 66 months in some areas, meaning that half of autistic children are not diagnosed until they are nearly 5 years old or more. Catherine Rice, Prevalence of Autism Spectrum Disorders: Autism and Developmental Disabilities Monitoring Network, Six Sites, United States, 2000, 56 Morbidity and Mortality Weekly Review SS-1, at 1 (Feb. 9, 2007); Catherine Rice, Prevalence of Autism Spectrum Disorders—Autism and Developmental Disabilities Monitoring Network, 14 Sites, United States, 2002, 56 Morbidity & Mortality Weekly Report SS-1, at 20 (Feb. 9, 2007) ("CDC 14 Sites Study"). Most children with autism, therefore, will already have wasted some of the most valuable treatment time in an inappropriate classroom setting before they are even diagnosed. See S. Rep. No. 109-318, at 3, 9; Roadmap, at 8.

II. MANY PUBLIC SCHOOLS ARE UNABLE TO COPE WITH AUTISM'S GROWING PREVALENCE AND CANNOT PROVIDE APPROPRIATE EDUCATIONAL SERVICES TO AUTISTIC STUDENTS

In recent years, the incidence of autism has grown dramatically. Fifty years ago, "[i]nfantile autism" was considered "a relatively rare form of schizophrenia" that was "not important from an epidemiological point of view." C.B. Ferster, Positive Reinforcement and Behavioral Deficits of Autistic Children, 32 Child Development 437, 437 (1961). In

1993, DOE had identified autism in only 19,058 children between 6 and 21. 2 Office of Special Educ. and Rehabilitative Servs., DOE (OSERS), 26th Annual (2004) Report to Congress on the Implementation of the Individuals with Disabilities Education Act 25 (2006).[4] But in 2007, DOE reported more than a quarter of a million autistic students between the ages of 6 and 21—the number had jumped by a factor of fourteen in as many years. OSERS, Data Analysis System, 1976-2007, Table 1-3.[5] The Centers for Disease Control report rates as high as 1 in every 150 children. CDC 14 Sites Study, at 12. With some 24,000 children with autism born each year (S. Rep. No. 109-318, at 3 (2006)), autism spectrum disorder is now more common among children than Down syndrome, diabetes, cancer, cystic fibrosis, hemophilia, and sickle cell disease.[6]

Properly educating each of these thousands of students requires trained personnel to apply specific, research-based educational methods in a properly designed program. Trained instructors must have mastered "applied behavior analysis, naturalistic learning, incidental teaching, assistive technology, socialization, communication, inclusion, adaptation of the environment, language interventions, assessment,

---

[4] Online at http://www.ed.gov/about/reports/annual/osep/2004/26th-vol-2.pdf.

[5] Online at http://www.ideadata.org/tables31st/ar_1-3.htm.

[6] Figures available from the National Institutes of Health's National Human Genome Research Institute, online at http://www.genome.gov/10001204 (Down, cystic fibrosis, hemophilia, sickle cell disease), http://ndep.nih.gov/diabetes/youth/youth.htm (diabetes), and http://seer.cancer.gov/csr/1975_2004/results_merged/sect_28_childhood_cancer.pdf (cancer).

and the effective use of data collection systems." CEICA, at 184.

A program typically involves intensive small-group or one-on-one instruction for the equivalent of a full school day, five days a week, year round. *Id.*, at 6. Instruction focuses on functional spontaneous communication, social instruction, cognitive development, play skills, and behavioral coaching. *Ibid.* Programs meeting these criteria and the personnel trained to implement them are in short supply all across the nation.

As to the programs, the National Institute of Mental Health's Autism Spectrum Disorder Expert Working Group has found that effective services "tend to be scattered, fragmented, and poorly coordinated," and that "even where services are available, public and private financing are often inadequate to meet the needs of most individuals with ASD [autism spectrum disorder] and their families." Roadmap, at 3. The Working Group found "a serious and persistent lack of adequate capacity to provide appropriate care for children, adolescents, youth, and adults with ASD." *Id.*, at 10.

As to the teachers, even when appropriate programs are available, the chronic shortage of special education teachers is particularly "serious in the growing field of autistic spectrum disorders." CEICA, at 184. Thus, "[i]t is possible that even a well designed special education program for a school district could still fall short of adequately providing for the special needs of children with autistic spectrum disorders." *Id.*, at 182. While some district's school systems do have adequately-staffed programs, many do not, and parents in these districts must look elsewhere to find appropriate services for their children.

See, *e.g.*, *A.K.* v. *Alexandria City Sch. Bd.*, 484 F.3d 672, 681-82 (CA4 2007) (no public school existed that could adequately meet the needs of a child with autism).

These shortages lead to school districts failing to provide appropriate services to autistic children in dramatic numbers. The CDC recently reported, for example, that as many as 38% of 8-year-old children with autism spectrum disorders were not receiving special education services in some locations, and that in many places, even where autistic children were offered some level of special education, the services offered had actually been designed to accommodate some other type of disorder (CDC, 14 Sites Study, at 19), making them non-individualized and useless. As a "pervasive developmental disorder," autism requires an equally pervasive plan of action.

In *amicus*'s experience advocating on behalf of autistic children and in supporting families affected by autism, it has encountered more than a thousand examples in which a school district, through lack of expertise, incompetence, mistake, or lack of will or funding, has proposed IEPs manifestly and demonstrably inappropriate for an autistic child. In one major urban school district alone, parents affiliated with *amicus* have grappled with the following:

- An autistic student confined to a wheelchair whose IEP would have placed him in a building that was not wheelchair-accessible;
- An autistic student who was recommended into a school for the deaf;
- An autistic student just six years old who was recommended into a class for adolescents;

- An autistic student who was recommended for a classroom of "emotionally disturbed" students;
- An autistic student capable of only "word approximations" whose IEP did not include instruction in speech and language;
- An autistic student whom the school district concluded needed year-round services but whose IEP would have placed him in a school that was closed for two months each year; and
- An autistic student with severe motor function deficits, including, *e.g.*, "toe walking," whose IEP not only offered no physical or occupational therapy but in fact recommended that he participate in only regular physical education class.

Cases from around the country confirm that these examples from *amicus*'s experience are representative of problems nationwide and further illustrate the myriad ways in which even the best-intentioned school district may nevertheless fail an autistic child. The school district may, for example, simply fail to recognize a child's disability.[7] Or, it may fail to timely develop an individualized education plan.[8] Or,

---

[7] See, *e.g.*, *Bd. of Educ. of Montgomery County* v. *S.G.*, No. 06-1411, 2007 WL 1213213, at *3-4 (CA4 Apr. 25, 2007); *Scott* v. *Dist. of Columbia*, No. 03-1672, 2006 WL 1102839, at *7-9 (D.D.C. Mar. 31, 2006); *Greenwich Bd. of Educ.* v. *Torok*, No. 03-cv-1407, 2003 WL 22429016, at *1 (D. Conn. Oct. 23, 2003).

[8] See, *e.g.*, *Gadsby* v. *Grasmick*, 109 F.3d 940, 945 (CA4 1997); *Gabel* v. *Bd. of Educ. of Hyde Park Cent. Sch. Dist.*, 368 F. Supp. 2d 313, 321 (S.D.N.Y. 2005); *Solomon-Lane* v. *Dist. of*

it may go through the motions of developing an individualized education plan while in reality deciding beforehand not to offer the needed services.[9] Or it may simply misdesign the student's educational plan so that it becomes ineffective and doomed to failure.[10] The overall picture is of a system that, more than it should, fails to provide appropriate education for students who need that education at the earliest possible age if they are ever to live independent and productive lives. With thousands of children newly diagnosed with autism each year, the problem will likely worsen.

III. CONGRESS DID NOT INTEND TO FORCE PARENTS TO CHOOSE BETWEEN SACRIFICING THEIR CHILD'S DEVELOPMENT OR SACRIFICING THEIR RIGHT TO A FREE EDUCATION

In 1997, Congress amended IDEA to give hearing officers and courts explicit statutory authority to grant reimbursement when students who have previously received special services are placed in private schools and the factfinder determines that the school district failed to offer a free appropriate public education in a timely manner. 20 U.S.C. §

Columbia, No. 99-cv-2404, 2005 WL 736533, at *1 (D.D.C. Mar. 31, 2005); *Justin G.* v. *Bd. of Educ. of Montgomery County*, 148 F. Supp. 2d 576, 583 (D. Md. 2001).

[9] See, *e.g.*, *Deal* v. *Hamilton County Bd. of Educ.*, 392 F.3d 840, 855-61 (CA6 2004); *W.G.* v. *Bd. of Trs.*, 960 F.2d 1479, 1481-1482, 1484-85 (CA9 1992); *Spielberg* v. *Henrico County Pub. Sch.*, 853 F.2d 256 (CA4 1988).

[10] See, *e.g.*, *D.L.* v. *Springfield Bd. of Educ.*, 536 F. Supp. 2d 534 (D.N.J. 2008); *L.B.* v. *Nebo Sch. Dist.*, 379 F.3d 966, 971-72 & 978 (CA10 2004); 20 U.S.C. § 1412(a)(5)(A).

1412(a)(10)(C)(ii). The statute provides a list of considerations to guide the decisionmaker's discretion. 20 U.S.C. § 1412(a)(10)(C)(iii)-(iv). Separately, the statute authorizes a court to grant "appropriate" relief (§ 1415(i)(2)(C)), which this Court has held allows reimbursement to further the purposes of the Act. *Sch. Comm. of Burlington* v. *Dep't of Educ. of Mass.*, 471 U.S. 359, 372 (1985).

In determining whether reimbursement is "appropriate" under this provision, "equitable considerations are relevant" (*id.*, at 374), and a court "must consider all relevant factors." *Florence County Sch. Dist. Four* v. *Carter*, 510 U.S. 7, 16 (1993). Presumably aware that this Court had long since approved ordering reimbursement under the language of § 1415 (see *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978)), Congress did not alter that language when it adopted the new provisions of § 1412.

Petitioner and supporting *amici* suggest that despite leaving the language of § 1415's grant of equitable discretion unchanged, Congress implicitly changed its meaning when it provided explicit authority to grant reimbursement under some conditions. Reading the statute as petitioner suggests would have a devastating effect on thousands of autistic students and their families. With no opportunity to seek reimbursement, parents could either leave their child in an inappropriate placement, causing the child harm, or risk economic harm or even bankruptcy by placing the child in a private placement.

This Court should not abide that result because it contravenes the statute's own declared purpose as well as this Court's avowed concern for the welfare of children; because there is no indication that Congress

intended that result and every indication that it would abhor it; and because construing the statute as petitioner suggests would draw meaningless distinctions and thus harm a group of students with disabilities to no useful end.

A. Parents Must Have An Opportunity To Seek Reimbursement If The Act Is To Accomplish Its Fundamental Goal Of Providing A Free Appropriate Public Education To All Children

IDEA's "most fundamental" mandate is "the provision of a free appropriate public education to a child with a disability." *Winkelman*, 127 S. Ct., at 2004; 20 U.S.C. § 1400(d)(1). As the Act itself states, Congress intended IDEA to achieve this goal for "all" children. 20 U.S.C. § 1400(d)(1). This Court has consistently interpreted IDEA in light of its announced purpose. See *Winkelman*, 127 S. Ct. at 2004; *Carter*, 510 U.S., at 8; *Burlington*, 471 U.S., at 372.

Faced with failures like those just described (see *supra*, § II), parents must choose between accepting whatever inappropriate placement the school district offers and placing a child in a needed private program while a challenge to the school district's IEP is pending. Given the irreversible damage that failing to treat autism quickly can cause, in this situation a parent's only responsible option may be to place the autistic child in the private program. Where a parent is thus forced to reject the school district's proposed IEP in order to get her child an adequate education, the Act's goal of giving each child "both an appropriate education and a free one" (*Burlington*, 471 U.S., at 372) requires that the child's parent have the opportunity to seek reimbursement, so that if the par-

ent can prove that the school district violated its obligations under the Act, the district can be made to fund the child's program.

The conclusion that reimbursement is sometimes required in order to achieve the Act's purpose is confirmed by the experience of the trial courts and courts of appeals, which have found in numerous individual cases that because of a school district's failures, providing the free appropriate education the Act demands required ordering the district to reimburse the parents. See, *e.g.*, *supra*, nn.7-10 (citing cases). In each case, the prevailing parent had the burden of showing that reimbursement was called for. *Schaffer* v. *Weast*, 546 U.S. 49, at 62 (2005). And in each case, the court looked at the particular facts proven to it and held that providing reimbursement on those facts was required to accomplish the Act's purpose as to a particular autistic child.

These courts' practical experience adjudicating the facts of dozens upon dozens of autism-related reimbursement cases, and *amicus*'s own experience supporting families dealing with autism, suggest that the right to seek reimbursement is a vital backstop to ensure that children who would otherwise slip through the cracks really get the free and appropriate education promised them. Protecting this population of children is part of the Congressional purpose behind the Act. And Congress' concern for these children's well-being is in turn part of a larger American tradition of taking responsibility for young people. The undeniable truth that youth is not just "a chronological fact," but "a time and a condition of life when a person may be most susceptible to * * * psychological damage" (*Johnson* v. *Texas*, 509 U.S. 350, 367 (1993)) applies with all the greater force

where the child in question suffers from a disability that will be a lifelong impairment if not ameliorated. In the cases to which the Court's decision in this case will apply, the choice that the court will have to make for the child may be the stark one between a life of dependence, social isolation, perhaps incomprehension on the one hand, and a productive life in society on the other. "Our society would be less than true to its heritage if it lacked abiding concern" for this most vulnerable group of children. *Lee* v. *Weisman*, 505 U.S. 577, 598 (1992).

One day, the causes and "triggers" of autism will be ascertained. Until that day, effective intervention and remediation is the only viable approach. Given Congress's overarching goal and our traditional commitment to the welfare of children, Congress should not be imagined to have abandoned the current and future generations of autistic children to a life in the darkness. This is especially true because autism is now the fastest growing category of disability that public schools encounter, and Congress has repeatedly voiced, and voted, its own special concern for autistic children in particular. See Education of the Handicapped Act Amendments of 1990, Pub. L. 101-467, Title I, § 101, Title IX, § 901(b)(10) to (20), 104 Stat. 1103, 1142, 1143 (1990) (specifying autism as disability); Children's Health Act of 2000, Pub. L. 106-310, Title I, 114 Stat. 1101 (2000) (expanding autism research); Pub. L. 108-446, Title I, 118 Stat. 2647, 2677 & 2682 (2004) (supporting autism teacher training and program development); Combating Autism Act of 2006, Pub. L. 109-416, 120 Stat. 2821 (2006) (funding expanded autism research). The Congress that thus acted repeatedly to protect the rights of autistic children could not have intended, and would not approve, an interpretation of its stat-

ute that would have such a dire effect on those children.

B. The Competing Rationales Presented By Petitioner's Supporting *Amici* For Limiting Reimbursement To Students Who Have Previously Received Special Education Do Not Square With The Act, Are Not Supported By The Legislative History, And Would Lead To Harsh And Senseless Results

While broad policy considerations and the specific purpose of the Act both favor allowing reimbursement in any case where the facts demand it, no coherent purpose favors petitioner's proposed interpretation. Petitioner would deny the right to seek reimbursement to parents whose children have never before received special education, but petitioner does not explain why Congress would have wanted to distinguish between students who had and students who had not received special education beyond asserting generically that the provision reflects the "balance [Congress] struck between the competing interests at play." Brief for Petitioner (Pet'r Br.) 40. Petitioner thus suggests that Congress, hoping to save school districts some money, drew an arbitrary line between two classes of students.

The only evidence from the 1997 amendments' legislative history mustered to support petitioner's view, presented by petitioner's supporting *amici*, is neither on point nor of much weight. All that is cited on the topic of reimbursement is a letter, not from a member of Congress, but from a "national education organization" suggesting that the statute offers relief "in the area of reimbursements * * * ." Brief for the

Council of Great City Schools as *Amicus Curiae* (Council Br.) 13. That statement does not reflect Congress's intent, only at most a constituent's personal understanding of the revisions and perhaps only that constituent's self-interested effort to plant in the Congressional record the seeds of the very argument that petitioner makes here.

Beyond that, *amici* summon a single statement, from Congressman Michael Castle, that the Act makes "it harder for parents to unilaterally place a child in" a private placement. See *id.*, at 12-13. Congressman Castle was first of all speaking about placement, not reimbursement, so his comment is not germane. But even if he had been speaking about reimbursement, the comment of a single House member would say little about the will of the entire Congress, especially given that Congress as a whole spoke by voting to approve § 1400(d)(1), which announces the purpose of the Act. "[T]he primary function of statutory construction is to effectuate the intent of Congress, and that function cannot properly be discharged by reliance upon a statement of a single Congressman, in the face of * * * weighty countervailing considerations * * * ." *F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 553 (1960).

Amicus City of New York also suggests that the legislative history supports reading § 1412 as an exclusive rather than alternative grant of authority to order reimbursement. See Brief for City of New York as *Amicus Curiae* (New York Br.) 15-23. But its only piece of evidence is an excerpt from a House Report merely summarizing § 1412's reimbursement provisions. See *id.*, at 19 (quoting H.R. Rep. No. 105-95, at 92). The quoted report nowhere says that Congress intended to narrow the authority that already existed

under the language of § 1415 or that the § 1412 remedy is meant to be exclusive. Because the report says only what the statute itself says, it adds nothing to the analysis of that statute.

The legislative history therefore does not reveal any Congressional intent to limit the threshold opportunity to seek reimbursement to parents of children who have been in special education at some point, no matter the equities of the case and no matter how egregious the violation. And since the language of § 1415 has already been found to allow reimbursement when the equities require it, the plain text of the statute does not require petitioner's result. That result should be avoided in the absence of some plausible Congressional goal that it might have furthered.

Petitioner's supporting *amici* do propose two further rationales for petitioner's proposed rule, but neither has support in the legislative history, neither can be squared with the statute's actual provisions, and neither is necessary given the factors that courts currently take into account in deciding whether to grant or deny reimbursement.

Amici first suggest that disallowing reimbursement will screen out parents who never intended to enroll in a public school, but they cite no evidence that the provision would in fact screen out such parents who, under petitioner's rule, could still place their children briefly in a public placement and then transfer them to a private school and seek to be reimbursed. See Council Br. 13-15; Brief for Nat'l Educ. Ass'n as *Amicus Curiae* (NEA Br.) 10-11. And the rule would also screen out many parents who did want a public education for their children. Because the rule is thus over- and underinclusive, it does not

fit the remedy that *amici* suggest it was trying to effect, undermining the suggestion that this was in fact Congress's goal. *Amici* furthermore offer no evidence that Congress faulted the way the courts currently handle such parents—and in fact cite extensive evidence that courts already routinely deny reimbursement to such parents. See Council Br. 28 (citing five cases denying reimbursement).[11] The fact that current judicial practice already screens out parents who were "uninterested in an appropriate education in the public schools" (NEA Br. 11), taken with the fact that Congress's statute would poorly fit that goal, suggests that preventing abusive claims was not what Congress had in mind.

Amici also suggest that petitioner's rule is consistent with IDEA's purpose because IDEA is intended to promote cooperation between parents and public authorities in developing an educational plan and so it makes sense to require parents to give a public placement "a chance to work" before rejecting it.

---

[11] The Senate and House Reports indicate that some of the provisions in the 1997 amendments were intended to "resolve" several issues that had been subject to litigation, specifically, "first," the proportion of funds that must be spent on private education; "second," whether providing funds to parochial schools was acceptable; and "third," the scope of the state's "child find" obligations. S. Rep. No. 105-17, at 13; H.R. Rep. No. 105-95, at 92. The reports discuss reimbursement obligations in a following paragraph that does not discuss "resolv[ing]" litigation issues, presumably because after *Burlington* there was no question remaining to resolve. One *amicus*'s suggestion that Congress enacted the 1997 amendments to address the 1985 and 1993 decisions in *Burlington* and *Carter* is therefore not supported by the reports on which *amicus* relies. Contra Council Br. 8 n.4 (citing S. Rep. No. 105-17, at 13; H.R. Rep. 105-95, at 92-93).

Council Br. 15; see also Brief for Nat'l Sch. Bds. Ass'n *et al.* as *Amici Curiae* (NSBA Br.) 7.

As an initial matter, this "give it a chance" theory does not describe the statute, because in a variety of common circumstances, a student will be eligible to seek reimbursement even though she has never given a particular proposed placement a trial run. This may happen when the child has earlier been misdiagnosed and given a placement under that wrong diagnosis: an autistic student, for example, who earlier mistakenly received services for deaf students would be eligible for reimbursement despite never having tried out the school's services for autistic students. It will also happen when a child receives special education services in one district and then moves to another, or where a child who received services from a school for younger children matriculates into an older school that makes different programs available. By the same token, petitioner's check-the-box rule would be satisfied if a child received services even for a short time and so does not in fact require a child to have tested out a placement.[12]

But even if the Council were correct that § 1412 expressed a preference for parents giving a particular placement a "chance," that section should not be read to limit the general power under § 1415 to order reimbursement when equity so demands, because read-

---

[12] One *amicus* would read "previously received" to mean that a child had to be in a placement for the time "necessary to assess the adequacy of the plan in practice" (Council Br. 16 & n.7), but the statute contains no such requirement. *Amicus*'s insistence elsewhere that the statute be read according to its "plain language" (*id.*, at 11) is at odds with its assertion that "previously received" means anything other than what it says.

ing the provisions in that way would lead to results that are both senseless and harsh. See, *e.g.*, *United States* v. *Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940) (Court will follow purpose of statute to avoid results that are either absurd or "plainly at variance with the policy of the legislation as a whole") (quoting *Ozawa* v. *United States*, 260 U.S. 178 (1922)); see also *Nixon* v. *Missouri Mun. League*, 541 U.S. 125, 138 (2004); *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994).

Most strikingly, petitioner, borrowing a page from Kafka, would deny parents reimbursement for failing to try out a placement even when the school has offered no public placement for the child to try—as when the school district fails to recognize the child's disability (see *supra*, n.7, citing cases) or simply fails to offer an IEP (see *supra*, n 8, citing cases). Petitioner would similarly deny parents the right to seek reimbursement where a district's IEP process is so irretrievably broken that no one could expect it to figure out what to do with a child with special needs (see *supra*, n.9, citing cases; see also *W.G.* v. *Board. of Trustees*, 960 F.2d 1479, 1481-1482, 1484-85 (CA9 1992)); or where the district's proposed IEP would itself violate a provision of the Act (see *D.L.*, 536 F. Supp. 2d, at 538-39). And it would deny the right to seek reimbursement even when a district *concedes* that its proposed placement is inappropriate. See, *e.g.*, *Frank G.* v. *Bd. of Educ. of Hyde Park*, 459 F.3d 356, 361 (CA2 2006). In these situations, the problem is not a lack of cooperation between parent and school, but a one-side failure of the school district. A court considering the equities should have the power to make a parent whole in these extreme situations.

Of course it is entirely true, as petitioner and *amici* suggest, that when a student or parent brings suit, school districts are presumed in that particular case to have acted in good faith. See Pet'r Br. 39; Council Br. 14; NSBA Br. 18; Brief for U.S. Conference of Mayors *et al.* as *Amici Curiae* (Mayors' Br.) 4; *Schaffer*, 546 U.S., at 62; *id.*, at 62-63 (STEVENS, J., concurring). But that presumption in individual cases does not require pretending that school districts act appropriately in every case and interpreting the statute as if that were true—as it is demonstrably not. See *Bernardsville Bd. of Educ.* v. *J.H.*, 42 F.3d 149, 156 (CA3 1994) ("[t]he record bespeaks an appalling failure on the part of the education bureaucracy to develop and implement an appropriate IEP"); see also *supra*, n.9 (citing *Deal* and *Spielberg*, in which the school district impermissibly predetermined the outcome of IEP process). The statute should be interpreted to take into account school districts' infrequent but inevitable failures. Indeed, in addition to allowing courts to make parents whole in particular cases, the possibility of a reimbursement order exerts an important corrective pressure to keep the rare rogue school district from acting in bad faith.

Furthermore, adopting the Council's give-it-a-chance rule would be especially dangerous as applied to children with autism. For some students with some disabilities, developing an appropriate individualized placement might require trial and error, so if a school district proposes something that might be acceptable, it would make sense to "assess the placement in practice." Council Br. 15; see also NSBA Br. 12-13. But the requirements of programs for children with autism have already been rigorously "assess[ed] in practice" using scientific methods (see

generally CEICA), and a program that does not meet the requisite standards is worse than useless.

Making a child suffer through a trial-and-error period will be pointless where the initially proposed IEP is fundamentally deficient (as when a program for the deaf is recommended to a student who is not deaf), and will be disastrous if the child is autistic and so wastes the critical developmental window "assess[ing] in practice" a program that has no chance of reaching her. See *D.L.*, 536 F. Supp. 2d, at 543 (making autistic child try out placement which violated the Act will be "useless and potentially counterproductive exercise" (quoting *Frank G.*, 459 F.3d, at 372)). When a parent avoids a demonstrably harmful program in these circumstances, that parent must in fairness have at least the opportunity to prove that she is entitled to relief.[13]

Finally, the current regime already encourages exactly the kind of cooperative development that the Council says petitioner's rule would also encourage, because the courts grant reimbursement according to equitable principles, and will deny reimbursement

---

[13] For the same reason, a categorical bar to ordering reimbursement when parents have not "work[ed] with" the school district before placing their child in a pubic school would harm children in some cases, and there is no reason to limit the courts' discretion in this way. See NEA Br. 12 (proposing prudential limit to equitable discretion). Of course parents should work with the school district when it is reasonable to do so, as the courts have recognized. See, *e.g.*, *Patricia P.*, 203 F.3d, at 468. But where taking the time to "work with" a school district that has already failed to propose an appropriate placement would put a child's development in jeopardy, a court should be allowed to consider that fact in determining whether a parent deserves reimbursement.

where, for example, a parent has failed to "cooperat[e] in the placement process" (*Patricia P.* v. *Bd. of Educ.*, 203 F.3d 462, 468 (CA7 2000)) or to request review of the IEP (*Bernardsville*, 42 F.3d, at 158). There is no evidence that Congress considered the courts' policing of parental good faith to be inadequate.

In sum, nothing in the legislative history suggests that Congress intended § 1412(a)(10)(C)(ii) to replace the equitable discretion to order reimbursement already provided under § 1415, and the provisions of § 1412 ill suit the ends that *amici* speculate Congress might have been trying to achieve. Section 1412 should instead be understood to guide courts' discretion in cases that meet its criteria, leaving other reimbursement cases to be decided under the equitable considerations developed in the caselaw.

C. Section 1412 Provides Specific Criteria For Granting Or Denying Reimbursement In A Common Set Of Circumstances, So Petitioner's Supporting *Amici* Are Incorrect That Allowing Reimbursement Under § 1415 Would Render § 1412 Superfluous

Petitioner and its supporting *amici* also claim that allowing reimbursement under the general equitable authority of § 1415 would render the specific provisions of § 1412 superfluous (see NEA Br. 10; Mayors' Br. 10; City Br. 11), but that is a mistake. First, the provisions provide a predictable and standard method for a court to decide whether to grant reimbursement to a child who had previously received special education. Second, the specific provisions of § 1412 provide concise, detailed, and intelli-

gible guidance to the parents of students who have previously received special education services about when they may be entitled to reimbursement, so these provisions help such parents to evaluate their options.[14] Third, § 1412 imposes specific limits on the court's discretion to deny reimbursement on certain grounds. See, *e.g.*, § 1412(a)(10)(C)(iv)(IV) (barring court from denying reimbursement for failure to give notice where school district has not informed parents of the requirement that they give notice). A court applying § 1415 to a child who had never before received special education services could deny reimbursement for failure to give the school district notice if it believed that the equities so required, even if § 1412 would not allow reimbursement to be denied as to a child who had previously received special education.

* * *

Petitioner and its supporting *amici* claim that reimbursement and related litigation drain schools of cash. But, as this Court recognized in *Carter*, the solution lies with the schools. 510 U.S., at 15. When a state and its school districts accept IDEA funds, they accept the obligation to provide a free appropriate

---

[14] The power to grant equitable reimbursement under § 1415 is limited by the extensive body of caselaw that guides courts' discretion in granting such reimbursement, so there is no basis for the contention that adding § 1412 rendered it easier for students who have not previously received special education to receive reimbursement than it is for students who have. Contra New York Br. 10; NSBA Br. 8. Furthermore, the guidance provided by § 1412 reduces parents' risk of acting rashly and never receiving reimbursement, so these provisions give parents covered by § 1412 an advantage in predictability that other parents, left to analyze the caselaw, lack.

public education to all students. Reimbursement is only an issue when the school district has failed to provide such an education to a student. "School officials who conform" to IDEA's mandate "need not worry about reimbursement claims." *Ibid.*

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

GARY S. MAYERSON
Director, Autism Speaks Federal Legal Appeals Project
Mayerson & Associates
330 West 38th Street
Suite 600
New York, NY 10018
(212) 265-7200

ROBERT H. PEES
Counsel of Record
SUNISH GULATI
CHRISTOPHER M. EGLESON
CHRISTOPHER J. CLORE
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036
(212) 872-1000

APRIL 2009

AMICUS CURIAE BRIEF

127

(9)

No. 08-305

Supreme Court, U.S.
FILED
MAR 3 - 2009
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

FOREST GROVE SCHOOL DISTRICT,

Petitioner,

v.

T.A.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE CITY OF NEW YORK IN SUPPORT OF PETITIONER

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
100 Church Street,
New York, New York 10007.
(212) 788-1010 or 0835 or 1613

LEONARD J. KOERNER,*
MICHAEL BEST,
EDWARD F.X. HART,
DRAKE A. COLLEY,
of Counsel.
**Counsel of Record*

BOTH 405JW6

833 A 05

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT

I. THE IDEA UNAMBIGUOUSLY PRECLUDES PRIVATE SCHOOL TUITION REIMBURSEMENT WHERE THE STUDENT HAS NOT PREVIOUSLY RECEIVED SPECIAL EDUCATION AND RELATED SERVICES FROM A PUBLIC AGENCY, AND THE NINTH CIRCUIT'S RULING TO THE CONTRARY CONFLICTS WITH THE PLAIN LANGUAGE OF THE STATUTE..... 6

II. THE PLAIN MEANING OF SUBSECTION (C)(ii) IS CONSISTENT WITH THE IDEA'S EMPHASIS ON COOPERATION BETWEEN PARENTS AND SCHOOL OFFICIALS.. 12

III. THE NINTH CIRCUIT'S DECISION IS CONTRARY TO THE LEGISLATIVE HISTORY OF THE STATUTE AND IS IN CONFLICT WITH POLICY CONSIDERATIONS UNDERLYING THE IDEA'S ENACTMENT..... 15

IV. THE NINTH CIRCUIT'S HOLDING IS IN CONFLICT WITH THIS COURT'S SPENDING CLAUSE DECISIONS BECAUSE THE IDEA DOES NOT PROVIDE CLEAR NOTICE OF THE STATES' OBLIGATION TO PROVIDE PRIVATE SCHOOL TUITION FOR STUDENTS WHO HAVE NOT PREVIOUSLY RECEIVED SPECIAL EDUCATION AND RELATED SERVICES FROM THE PUBLIC AGENCY.....23

CONCLUSION.....28

TABLE OF CITED AUTHORITIES

Cases: **Page**

Arlington Central School Dist. v. Murphy,
548 U.S. 291 (2006).....11, 24, 25, 26

Berger v. Medina City School District,
348 F.3D 513 (6TH CIR. 2003).....22

Board of Education of the City School District of the City of New York v. Tom F. on behalf of Gilbert F.,
2005 U.S. Dist. LEXIS 49 (2d. Cir. 2005), affirmed by equally divided court 128 S. Ct. 1 (2007).....1, 2, 4

Board of Education v. Rowley,
458 U.S. 176 (1982).....15, 16, 27

Burlington Sch. Comm. v. Dep't of Educ.,
471 U.S. 359 (1985).....9, 16, 17, 18

Cedar Rapids Community School Dist. v. Garret F.,
526 U.S. 66 (1999).....15, 24

Connecticut Nat. Bank v. Germain,
503 U.S. 249 (1992).....6

Florence Co. Sch. Dist. v. Carter,
510 U.S. 7 .....16, 18

Frank G. v. Board of Education of Hyde Park Central School Dist.,
459 F.3d 356 (2d Cir. 2006), cert. denied 128 S. Ct. 436 (2007).....2, 4

Gary S. v. Manchester Sch. Dist.,
241 F. Supp.2d 111, 114-15 (D.N.H. 2003) 19

Gebser v. Lago Vista Independent School Dist.,
524 U.S. 274 (1998).....24

Greenland School District v. Amy N. ,
358 F.3d 150 (1st Cir. 2004).....19, 21, 22

Hartford Underwriters Ins. Co. v. Union Planters
Bank, N.A.,
530 U.S. 1 (2000).....6

Pennhurst State Sch. And Hosp. v. Halderman,
451 U.S. 1 (1981).....24, 27

Schaffer v. Weast,
546 U.S. 49 (2005).....13, 23

United States v. Albertini,
472 U.S. 675 (1985).....6

United States v. Ron Pair Enterprises, Inc.,
489 U.S. 235 (1989).....6

Winkelman v. Parma City School District,
550 U.S. 516 (2007).....24, 25

STATUTES

34 C.F.R. § 300.132.....17

34 C.F.R. § 300.227.....17

34 C.F.R. § 300.307(b).....17

34 C.F.R. § 300.347.....17

34 C.F.R. § 300.403 ..... 20, 21

34 C.F.R. § 300.403(C) 20, 22

34 C.F.R. § 300.450 17

20 U.S.C. § 615 22

20 U.S.C. § 1400(C)(3) 13

20 U.S.C. § 1400(d)(1)(A) 25

20 U.S.C. § 1412 21

20 U.S.C. § 1412(3) 15

20 U.S.C. § 1412(5) 15

20 U.S.C. § 1412(a)(5)(A) 24

20 U.S.C. § 1412(a)(10)(A) 13, 18

20 U.S.C. § 1412(a)(10)(B) 18

20 U.S.C. § 1412(a)(10)(C) ..... passim

20 U.S.C. § 1412(a)(10)(C)(i) 12, 21

20 U.S.C. § 1412 (a)(10)(C)(ii) ..... passim

20 U.S.C. § 1412(a)(10)(C)(iii) 13, 15

20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa) 14, 22

20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb) 14

20 U.S.C. § 1412(a)(10)(C)(iii)(III) 12

20 U.S.C. § 1413 16

20 U.S.C. § 1415 12

20 U.S.C. § 1415(e)(2).....11, 26

20 U.S.C. § 1415(i)(2)(C)(iii).....11, 12, 17

MISCELLANEOUS

64 Fed. Reg. 12406 (March 12, 1999).....21

64 Fed. Reg. 12601 (March 12, 1999).....21

64 Fed. Reg. 12602 (March 12, 1999).....20

H.R. No. 105-95 (1997).....8, 18, 20, 21, 22

Katz, Alyssa, "The Autism Clause: A handful of new schools charge up to $140,000 a year to educate an autistic child. Who can pay that much? Anyone with the right lawyer," (New York Magazine, Oct 23, 2006). 3

BRIEF OF AMICUS CURIAE THE CITY OF NEW YORK

This brief is submitted on behalf of the City of New York as amicus curiae in support of the Petitioners.

INTEREST OF THE AMICUS CURIAE

The City of New York is a municipal corporation organized and existing under the laws of the State of New York. The City of New York provides substantial funding to the New York City Department of Education. The New York City Department of Education's budget for fiscal year 2009 is $21.1 billion, of which $10.6 billion is provided by the City of New York.

This case is vitally important to amicus, the City of New York, and its children. The City's public school system is the largest public school system in the country, providing primary and secondary education to over one million pre-kindergarten to grade twelve students in approximately 1,500 schools. The City serves more than one-third of the total pupil enrollment of the State of New York. During the 2007-2008 school year, there were 173,856 students in special education in New York City public schools, and the New York City Department of Education spent $3.18 billion on special education.

The New York City Department of Education was a party in a matter previously before this Court: *Board of Education of the City School District of the City of New York v. Tom F. on behalf of Gilbert F., a minor child*, 06-637, which involved the question of whether the Individuals with Disabilities Education Act permits tuition reimbursement where a child has not previously received special education from a public agency.

On October 10, 2007, this Court affirmed without opinion the decision of the United States Court of Appeals for the Second Circuit in *Tom F.* by an equally divided Court. 128 S. Ct. at 1. Justice Kennedy took no part in the decision of the case. *Id.* at 2. Thereafter, this Court denied certiorari in *Frank G. v. Board of Education*, 128 S. Ct. at 436, with Justice Kennedy again taking no part in the decision.

New York City's experience demonstrates that requiring the payment of private school tuition under the IDEA imposes a financially burdensome substantive obligation on school districts that they would not otherwise be obligated to pay. In New York City, claims for tuition reimbursement by disabled children whose parents have unilaterally placed them in private school and who have not previously received special education or related services from a public agency are governed by the Second Circuit's decisions in *Board of Education of the City School District of the City of New York v. Tom F. on behalf of Gilbert F.*, 2005 U.S. Dist. LEXIS 49 (2d. Cir. 2005) and *Frank G. v. Board of Education of Hyde Park Central School Dist.*, 459 F.3d 356 (2d Cir. 2006), which held that the IDEA permits those students to make such claims.

With that holding the rule in New York, the City of New York has faced an ever-increasing burden of claims for tuition payments. In 2005-2006, the New York City Department of Education received 3023 requests for IDEA administrative hearings in which the parent had unilaterally placed the child in a private school and was seeking to have the New York City Department of Education pay the tuition. In 2006-2007, that number increased to 3688, and in 2007-2008 it increased further to 4368. Meanwhile, the financial cost to the New York City Department of Education is substantial and growing. During 2005-2006, as a result of settlements of these cases and orders by impartial hearing officers, the New York City Department of Education paid over $53 million for the private school

tuition of unilaterally placed children. During 2006-2007, it paid over $57.6 million, and during 2007-2008, it paid over $88.9 million. Furthermore, more than half of these hearing requests involved students who had not previously received special education and related services from the New York City Department of Education.

The increasing numbers of students filing these claims provides strong evidence that the rule set forth by the Ninth Circuit (and Second Circuit), if adopted by this Court, would give a distinct class of people students who had not previously received special education and related services under the authority of a public agency the substantive right to obtain private school tuition reimbursement. The reason they are bringing these claims in increasing numbers is precisely because they view the ability to obtain tuition reimbursement as an enforceable right. Indeed, it is not only students and parents themselves, but the private schools the children attend, that view the ability to obtain tuition reimbursement from the New York City Department of Education as an enforceable right. In New York City, some private schools serving primarily disabled students have adopted business plans based upon the expectation that their students will obtain the money to pay tuition by suing the New York City Department of Education under the IDEA. *See Katz, Alyssa, "The Autism Clause: A handful of new schools charge up to $140,000 a year to educate an autistic child. Who can pay that much? Anyone with the right lawyer," (New York Magazine, Oct 23, 2006).* Other New York City private schools require students requesting financial aid to agree to sue the New York City Department of Education for the cost of the private school tuition,[1] and some private

[1] These schools require parents to sign an agreement in which they acknowledge that in the event that they have been offered a public school placement for their child, the parents have chosen to reject the public school placement, and further acknowledge that they are dependent upon

schools include on their websites contact information for lawyers who specialize in suing the New York City Department of Education for tuition payments under the IDEA.[2]

Thus, there can be no doubt that in New York City, students who have never attended public school or received special education and related services from a public school have gained the substantive, enforceable right to obtain tuition reimbursement from the New York City Department of Education, and that this right imposes a substantial financial burden on New York City and the New York City Department of Education that, absent the *Frank G.* and *Tom F.* rule, there would be no legal obligation to pay.

Because of the importance to amicus of the issues before this Court, amicus submits this brief to assist the Court in its resolution of this case.

SUMMARY OF THE ARGUMENT

The Individuals with Disabilities Education Act (IDEA) precludes parents of a child who has never received special education and related services under the authority of a public agency from obtaining reimbursement of their child's private school tuition. The language of 20 U.S.C. § 1412(a)(10)(c), which authorizes parents of "a child who has previously received special education and related services under the authority of a public agency" to request reimbursement of private school tuition, is unambiguous and establishes a condition precedent to a parent's request for tuition reimbursement, and that condition is that the

receiving prospective payment from the New York City Department of Education following an IDEA impartial hearing in order to pay tuition.

[2] *See, e.g.*, http://www.smithschool.net/resources.asp

child must have previously received special education and related services under the authority of a public agency.

A straightforward reading of the statutory language is consistent with the purpose and structure of the IDEA, which is meant to foster cooperation between parents and school districts. It is also consistent with the IDEA's legislative history, with Congress' intent that children with disabilities be educated with nondisabled children whenever possible, and with Congress' intent to restrict the availability of private school tuition reimbursement.

The Court of Appeals for the Ninth Circuit erred in ruling that 20 U.S.C. § 1412(a)(10)(C)(ii) is ambiguous and does not apply where a child has not previously received special education and related services from a public agency. The Ninth Circuit's ruling would undermine the IDEA's goals by creating a perverse incentive for parents to unilaterally place their children in private school without ever trying the public school placement.

Moreover, the IDEA was enacted pursuant to Congress' power under the Spending Clause, and the Ninth Circuit erred in failing to analyze the IDEA in accordance with this Court's Spending Clause jurisprudence. Statutes enacted pursuant to the Spending Clause must give States clear notice of the conditions Congress has attached to the receipt of federal funds. Even if it were found that the language of the statute were ambiguous, it would be improper to rule as the Ninth Circuit did, because the IDEA does not provide clear notice that a State will be liable for paying the private school tuition for children who have never previously received special education and related services under the authority of a public agency. If the IDEA is ambiguous about whether the States have such an obligation, then that obligation cannot be imposed upon them.

ARGUMENT

I. The IDEA Unambiguously Precludes Private School Tuition Reimbursement Where The Student Has Not Previously Received Special Education And Related Services From A Public Agency, And The Ninth Circuit's Ruling To The Contrary Conflicts With The Plain Language Of The Statute.

A. The Statutory Language Is Unambiguous

Proper respect for the legislative powers vested in Congress implies that statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose. *United States v. Albertini*, 472 U.S. 675, 680 (1985). The Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992). The Court has further recognized that when the statutory language is plain, "the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)(quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)).

The statutory language at issue in this case, 20 U.S.C. § 1412 (a)(10)(C)(ii), is clear and unambiguous, and establishes a statutory threshold that must be met before parents may ask a hearing officer or courts to order tuition reimbursement when enrolling their child in a private school without the consent of the school district.

The language chosen by Congress means what it says:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school, without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner to that enrollment.

20 U.S.C. § 1412(a)(10)(C)(ii). The plain meaning of this language is that courts and hearing officers may order reimbursement of private school tuition only if the student "previously received special education and related services" from the school district. This interpretation is a straightforward reading of the statutory language, and it should be adopted by this Court.

This interpretation also flows naturally from a reading of the statutory section of which this clause is part. The provision at issue clause (ii) of subsection (C) is part of a subsection entitled "Payment for education of children enrolled in private schools without consent of or referral by the public agency." 20 U.S.C. § 1412(a)(10)(C). Subsection (C)(ii) sets forth the authority of hearing officers or courts to order tuition reimbursement, and it says that they may do so where the child has previously received special education and related services from the school district. The statute then sets forth factors hearing officers and courts should consider in determining whether "the reimbursement described in clause (ii)" should be reduced or denied. 20 U.S.C. § 1412(a)(10)(C)(iii). For example, as will be discussed in greater detail, *infra*, a

parent is required to give ten business days notice to the public agency prior to removing the child from the public school. Thus, the statute makes quite plain that what the reimbursement hearing officers or courts may order is the reimbursement specified in subsection (C)(ii), and the language of subsection (C)(ii) states plainly that that reimbursement is available for "students who previously received special education and related services" from the school district.

The language in subsection (C)(ii), therefore, establishes a condition precedent to a parent's request for tuition reimbursement. The language of the statute means that parents who unilaterally place their child in a private school may not request tuition reimbursement and a hearing officer or court cannot consider granting tuition reimbursement unless the child has previously received special education and related services under the authority of a public agency.

20 U.S.C. § 1412(a)(10)(C)(ii) was added to the IDEA as part of the 1997 amendments, in which Congress clarified the circumstances under which tuition reimbursement would be available.[3] Through the addition of the language at issue here, Congress restricted the availability of reimbursement. In enacting § 1412, Congress could have made explicit in the statutory language of the IDEA that tuition reimbursement would be available to the parent of a child who has never previously received special education and related services from a public agency, but Congress did no such thing.

B. The Ninth Circuit's Reading Of The Statute Is Untenable

[3] *See* H.R. Rep. 105-95, at 93, reprinted in 1997 U.S.C.C.A.N. 78, 90.

Despite the clear language of 28 U.S.C. § 1412(a)(10)(C)(ii), the Ninth Circuit held that because the student "never received special education and related services, § 1412 (a)(10)(C)(ii) does not apply in this case. He may recover reimbursement, if at all, only under principles of equity pursuant to § 1415(i)(2)(C)." 523 F.3d at 1087. Thus, even though Congress set forth in § 1412(a)(10)(C) the circumstances under which private school tuition reimbursement is available - and entitled the subsection "Payment for education of children enrolled in private schools without the consent of or referral by the public agency" - the Ninth Circuit created a separate mechanism outside of that subsection for private school tuition reimbursement under the IDEA.[4]

The Ninth Circuit's reading would subvert the intent of Congress to limit the circumstances under which tuition reimbursement would be permitted, and would

[4] It should be noted that *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985) did not address the situation in this case, where the child never previously received special education and related services under the authority of a public agency. The student in *Burlington* had, prior to being removed from public school, received special education and related services pursuant to an IEP in a public school. *Burlington*, 471 U.S. at 361. After extensive and lengthy discussions which resulted in the school district proposing a new placement for the student, the student's parents rejected the proposed new IEP and enrolled him in a private school. *Id.* at 362. Thus, *Burlington* established the availability of a tuition reimbursement remedy where the student had been removed from a public school special education placement. It did not establish that such a remedy was available where the student had not previously received special education and related services, because the Court had no occasion to consider that question. Thus, the Ninth Circuit's decision does not follow from *Burlington*.

allow a hearing officer and district court to grant relief in any circumstance. Such a reading would permit a court to ignore the limiting language of the 1997 amendments by permitting a parent to receive tuition reimbursement without ever trying the public school program, which we respectfully submit would produce an absurd result.

Under the Ninth Circuit's interpretation, parents who place their children in private school without cooperating with the public school would have an advantage in getting tuition reimbursement over parents who cooperate with the public school, because the limiting factors of 20 U.S.C. § 1412(A)(10)(c)(iii) would not be applicable to a tuition reimbursement claim if the student has not previously received special education and related services from the public agency. For instance, if a child has been receiving special education in a public school, the parents would be obligated, before removing the child from public school and seeking private school tuition reimbursement, to give the school district ten days written notice, and their tuition claim could be reduced or denied if they acted unreasonably. 20 U.S.C. § 1412(a)(10)(C)(iii)(III). If the student had never set foot in a public school placement, however, the parents would have no obligation to give notice to the school district and their tuition claim would not be subject to reduction or denial based upon their unreasonable actions. There is nothing in the text of the statute that suggests that Congress intended to create this unreasonable advantage.

Furthermore, the Ninth Circuit apparently failed to consider the language of § 1412(a)(10)(C)(i) before declaring the language of § 1412(a)(10)(C)(ii) to be ambiguous. Section 1412(a)(10)(C)(ii) is wholly consistent with the plain language of § 1412(a)(10)(C)(i), which limits the obligation of the local educational agency to pay for the cost of private school tuition. § 1412(a)(10)(C)(i) states:

> Subject to subparagraph (A), this subchapter does not require a local

> educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

20 U.S.C. § 1412(a)(10)(C)(i). Sections 1412(a)(10)(C)(i) and (C)(ii) unambiguously demonstrate Congress's intent to limit the circumstances under which tuition reimbursement would be available.

Although the language of 20 U.S.C. § 1415(i)(2)(C)(iii)[5] was unchanged by the 1997 amendments, the addition of § 1412(a)(10)(C)(ii) as part of the 1997 amendments should properly be viewed as limiting the relief that may be granted pursuant to § 1415(i)(2)(C), which previously existed. To view § 1412(a)(10)(C)(ii) otherwise would render the language "previously received" as surplusage. The practical effect of the Court of Appeals' reading would be that Congress enacted a provision with no practical effect. This result should be avoided.

The Ninth Circuit found that the language of § 1412(a)(10)(C)(ii) is ambiguous "because the text does not *clearly* create a categorical bar and because such an interpretation is in tension with the broader context of the statute." 523 F.3d at 1088 (emphasis in original). If, in fact, an ambiguity exists, then the statute does not provide the "clear notice" required under the spending clause. *See Arlington Central School Dist. v. Murphy*, 548 U.S. 291 (2006). Nonetheless, it is respectfully urged that there is no

[5] Previously codified as § 1415(e)(2).

ambiguity. A district court's or hearing officer's authority to grant equitable relief should not extend to include the power to grant relief that is not permitted under the limiting language of § 1412(a)(10)(C)(ii). Consequently, in the absence of ambiguous statutory language, a resort to the canons of statutory construction is unwarranted.

The path chosen by the Ninth Circuit to avoid the plain language of § 1412(a)(10)(C)(ii) was to create an alternate route to obtain private school tuition reimbursement outside of § 1412(a)(10)(C). Specifically, the Ninth Circuit held that private school tuition reimbursement was available as an equitable remedy under § 1415(i)(2)(C). This argument, however, is also contradicted by the plain language of that section, because § 1415(i)(2)(C) grants "the court" the power to award "appropriate" relief.[6] It does not grant such power to hearing officers, yet the Ninth Circuit's decision requires that it do so.

II. The Plain Meaning Of Subsection (C)(ii) Is Consistent With The IDEA's Emphasis On Cooperation Between Parents And School Officials.

A straightforward reading of the statutory language is also consistent with the purpose and structure of the IDEA. Congress intended to promote cooperation between the parent and the school district, *see Schaffer v. Weast*, 546 U.S. 49, 53 (2005) ("[t]he core of the statute . . . is the cooperative process that it establishes between parents and

[6] It is also worth noting that Congress entitled § 1415 "Procedural safeguards." Unlike § 1412(a)(10)(C)(ii), which is entitled "Reimbursement for private school placement," § 1415 does not contain a single reference to tuition reimbursement.

schools"), and it intended that if a parent genuinely wants to avail the child of a free appropriate public education, the public school must be afforded the opportunity to work with the parent. Subsection (C)(ii) demonstrates Congress's intent that the parent cooperate with the school district in a meaningful way, as well as Congress's recognition that the only way to foster cooperation is for the student to participate, even if for only a short while, in the public education process.

The purpose of the IDEA is to provide children with disabilities with access to a free appropriate public education ("FAPE"). 20 U.S.C. § 1400(c)(3). The IDEA, however, does not require states to provide a FAPE to every child. Where parents voluntarily place a child in private school, they are not entitled to a FAPE at public expense. Instead, the IDEA requires a state to provide only certain defined services, and then only the amount of those services that can be paid for with each child's proportionate share of funds under the IDEA. 20 U.S.C. § 1412(a)(10)(A).

Thus, the IDEA creates a distinction between students in private schools and students who are in public school or receive services under the authority of a public authority. Consistent with that distinction and with the different obligations a state has in regard to children in those distinct situations the IDEA places limits on the ability of parents to request private school tuition reimbursement, even where a court or hearing officer finds that the school district did not offer a student FAPE. For instance, under 20 U.S.C. § 1412(A)(10)(C)(iii), tuition reimbursement may be reduced or denied if at the most recent IEP meeting that the parents attended "prior to removal of the child from the public school," the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a

private school at public expense[7]; or if within "10 business days . . . prior to the removal of the child from the public school," the parents did not give written notice to the public agency.[8]

These limitations presume that the child was receiving services from the public school and that the child is being removed from the public school placement to be placed unilaterally in private school. Seen in the context of the statute, then, the "previously received" language makes perfect sense. It means that parents may request tuition reimbursement only for those students who have received special education and related services under the authority of the public agency. This limitation, like the factors contained in § 1412(A)(10)(C)(iii), is meant to foster cooperation between parents and school districts.

The Ninth Circuit's interpretation of the statute, on the other hand, is inconsistent with the IDEA's structure and would undermine the cooperation the IDEA is intended to foster. If students need not ever have received special education and related services from the public agency before requesting private school tuition reimbursement, then not only is the "previously received" language rendered meaningless, but the ten day notice requirement is rendered entirely ineffective, since there can be no notice "prior to removal of the child from the public school" if the child never received any services from the public school.

Indeed, the Ninth Circuit's interpretation would create a perverse incentive for parents to avoid ever trying to work out an appropriate placement with the school district. Under that interpretation, parents whose child

[7] 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa).

[8] 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb).

participates in the public placement would be required to provide written notice of their intent to reject it ten days prior to removing the child from the public placement. If, however, the student never participated in the public placement, then the parent would not have to provide such notice. Thus, the Ninth Circuit's interpretation would make it less likely that parents would cooperate with school districts. This result would run counter to Congress's intent to foster more, rather than less, cooperation between parents and school districts.

III. The Ninth Circuit's Decision Is Contrary To The Legislative History Of The Statute And Is In Conflict With The IDEA's Emphasis On Educating Disabled Children With Their Non-Disabled Peers.

The IDEA, as a whole, foresees state implementation of federal standards. § 1412(a); *Cedar Rapids Community School Dist. v. Garret F.*, 526 U.S. 66, 68 (1999). As a matter of policy, Congress intended "to make public education available to handicapped children" with a goal of mainstreaming them into the public educational system. *Board of Education v. Rowley*, 458 U.S. 176, 192 (1982). States that receive funds under the Act must, in order of priority, provide education first to handicapped children who are not receiving an education, and second to the most severely handicapped children who are receiving an inadequate education. 20 U.S.C. § 1412(3). States must also, to the maximum extent appropriate, educate handicapped children with children who are not handicapped. 20 U.S.C. § 1412(5). Recognizing, however, that the nature or severity of some handicaps may be such that education in regular classes cannot be satisfactorily accomplished with the use of supplementary aids and services, the Act provides for the

education of some handicapped children in separate classes or institutional settings. 20 U.S.C. §1412(5); 1413(a)(4).

The Court has noted that

> "[t]he Act requires participating States to educate handicapped children with nonhandicapped children whenever possible. When that 'mainstreaming' preference of the Act has been met and a child is being educated in the regular classrooms of a public school system, the system itself monitors the educational progress of the child."

Board of Education v. Rowley, supra, 458 U.S. at 202-203.

The IDEA has three categories for children with disabilities who attend private school. The first category involves the situation where the school district places the child at a private school to receive special educational services. 20 U.S.C. § 1412(a)(10)(B). Such placement through the public school district is considered a public placement or program. *Burlington*, 471 U.S. 359, 369-70 (1985). The second category, referred to as "FAPE is at issue," involves the parent placing the child at a private school because FAPE or appropriate special education services are not available at the public school, and the parent places the child at the private school in order to obtain appropriate services. *Burlington*, 471 U.S. at 369-372; *Florence Co. Sch. Dist. v. Carter*, 510 U.S. 7; 20 U.S.C. § 1412(a)(10)(C). The third category, often referred to as "voluntarily enrolled in private school," involves situations where the school district has offered FAPE to the child, but the parents decline FAPE and instead choose to enroll the child in private school because of their personal preferences. 20 U.S.C. § 1412(a)(10)(A), (C); 34 C.F.R. § 300.450-462.

In 1985, the Court held that the remedy of tuition reimbursement was authorized under 20 U.S.C. § 1415(e)(2).[9] In *Burlington, supra*, 471 U.S. at 369, the Court noted that the Act

> "confers on the reviewing court the following authority: '[T]he court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determined appropriate.' § 1415(e)(2)."

In *Burlington, supra*, the Court determined that under the narrow circumstance where a parent unilaterally obtains and pays for special education services to which it is ultimately determined the child was entitled, the parent may be entitled to reimbursement, noting that:

> The Act contemplates that such education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as nonhandicapped children, but the Act also provides for placement in private schools at public expense *where this is not possible*. See § 1412(5); 34 C.F.R. §§ 300.132, 300.227, 300.307(b), 300.347 (1984)(emphasis supplied).

[9] Recodified as amended 20 U.S.C. § 1415(i)(2)(C)(iii).

Burlington Sch. Comm. v. Dep't of Educ., *supra*, 471 U.S. at 369. *See also Florence County Sch. Dist. Four et al. v. Carter*, *supra*, 510 U.S. at 15.

Reimbursement of private school tuition is necessary only where it is determined after a hearing that the services offered by the school district are inadequate or inappropriate, the services chosen by the parents are appropriate, and equitable considerations support the parents' claim. *See* 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.403(c). Even where tuition reimbursement is authorized under the IDEA, the parents must show that the school district is incapable of providing FAPE and that the private school placement is proper. *Florence County Sch. Dist. Four et al. v. Carter*, *supra*, 510 U.S. at 13-15. Those conditions serve the public interest that public funds not be spent to support inappropriate private placements. *See* 64 Fed. Reg. 12602 (Mar. 12, 1999)(discussion of comments to 34 C.F.R. § 300.403(c)).

The statute has continued to evolve according to congressional policy and, accordingly, the IDEA was reauthorized by Congress in 1997. As with other reauthorizations of the statute, the 1997 reauthorization of the IDEA changed prior requirements and added new ones. The Report of the House Committee on Education and the Workforce explained that "[t]he bill makes a number of changes to clarify the responsibility of public school districts to children with disabilities." H.R. No. 105-95, at 92 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 78, 90. Those changes serve to define the rights of disabled children and their parents, and the responsibilities of local educational authorities with regard to the education of those children.

Thus, the 1997 amendments further clarified the degree of parental cooperation required by adding a section entitled "Payment for education of children enrolled in

private schools without consent of or referral by the public agency."[10] *Greenland School District v. Amy N.*, 358 F.3d 150, 152 (1st Cir. 2004). That section opens with a general policy statement that explains that the IDEA "does not require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." 20 U.S.C. § 1412(a)(10)(C)(i).

The addition of 20 U.S.C. § 1412 to the Act is explained in H.R. Rep. No. 105-95:

> Section 612 [20 U.S.C. § 1412] also specifies that parents may be reimbursed for the cost of a private educational placement under certain conditions (i.e., when a due process hearing officer or judge determines that a public agency had not made a free appropriate public education available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency's consent). Previously, the child must have received special education and related services under the authority of a public agency.

[10] 20 U.S.C. § 1412(a)(10)(C); *see* H.R. Rep. 105-95, at 93, reprinted in 1997 U.S.C.C.A.N. 78, 90. *See Gary S. v. Manchester Sch. Dist.*, 241 F. Supp.2d 111, 114-15 (D.N.H. 2003).

H.R. Rep. No. 105-95, at 92 (1997), as reprinted in 1997 U.S.C.C.A.N. 78, 90.

The 1997 amendments both clarified the circumstances under which tuition reimbursement would be available, and restricted the availability of that remedy by adding language providing that tuition reimbursement for a unilateral parental placement is available when the student "previously received special education and related services under the authority of a public agency." 20 U.S.C. § 1412(a)(10)(C)(ii).[11]

[11] That language was also added to the applicable implementing regulations for IDEA, at the same time. 34 C.F.R. § 300.403(C). 34 C.F.R. § 300.403 states, in relevant part:

> (a) *General.* This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility.
>
> (c) *Reimbursement for private school placement.* If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the

Thus, the 1997 amendments expressly limit the availability of the tuition remedy to children who received special education services at the public school before their parents enrolled them in private school. The legislative history indicates that this was a limitation that Congress clearly intended to adopt. *See* 34 C.F.R. § 300.403; H.R. Rep. No. 105-95, 1997 U.S.C.C.A.N. 78, 90. The addition of 20 U.S.C. § 1412 (a)(10)(C)(ii) as part of the 1997 reauthorization demonstrates a policy determination made at the discretion of Congress. The plain language of the IDEA amendments makes it clear that a threshold requirement for a claim of tuition reimbursement is that the child had previously received special education and related services from the public agency. The IDEA's history and the 1997 reauthorization of that statute demonstrate that Congress intended to limit the right of parents of children with disabilities to seek private school reimbursement as a remedy under the statute.

The 1997 amendments to the IDEA reinforced the principle that children should not be unnecessarily removed from regular educational environments. 20 U.S.C. § 1412(a)(5)(A). *See also Greenland School District v. Amy*

> agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.

The Department of Education's interpretative guidance to 34 C.F.R. § 300.403 clarifies that tuition reimbursement is only available on claims "made before a child is removed from a public agency placement." 64 Fed. Reg. 12406, 12601 (March 12, 1999).

N., *supra*, 358 F.3d at 152. This was accomplished, in part, by the elimination of "inappropriate financial incentives for referring children to special education." H.R. Rep. 105-95, at 90 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 87. It is beyond cavil that one specific purpose of the 1997 amendments was to control government expenditures for students voluntarily placed in private schools by their parents. *Id.* at 91-92.

Under the IDEA, school districts must be given an opportunity to cure any alleged deficiency. To that end, the IDEA requires notice that special education is an issue in order for parents to bring a claim for tuition reimbursement. 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa). *Greenland*, *supra*, 358 F.3d 150; *see also Berger v. Medina City School District*, 348 F.3d 513 (reimbursement may be reduced or denied where parents did not comply with notice requirements under the IDEA). The Court of Appeals for the First Circuit has noted that those statutory provisions demonstrate Congress's intent that before parents place their child in private school, they must at least give notice to the public agency that special education is at issue. The First Circuit found that this "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a free appropriate public education can be provided" in the public schools. *Greenland*, *supra*, 358 F.3d at 160.[12]

[12] The IDEIA or "New IDEA" provisions went into effect in July 2005. 20 U.S.C. § 615 *et seq.* One of the new provisions specifically calls for a "last chance meeting" between the local educational agency and the parents before the parents seek an impartial due process hearing. The enactment of that provision can only be read as Congress' continuing attempt to address the situation of parents unilaterally withdrawing their children from local

In the instant case, the Court of Appeals for the Ninth Circuit failed to consider an express purpose of the IDEA, which is to educate handicapped children with nonhandicapped children whenever possible. The Ninth Circuit also ignored the fact that a specific purpose of the 1997 amendments was to control government expenditures for students voluntarily placed in private schools by their parents. This Court has noted that "Congress has also repeatedly amended the Act in order to reduce its administrative and litigation-related costs. For example, in 1997 Congress mandated that States offer mediation for IDEA disputes (citation omitted)." *Schaffer*, *supra*, 546 U.S. at 59.

Public policy does not require that the parents of children who require special education and related services be reimbursed for unilaterally placing those children in private school where the parent's rejection of the public placement is based upon mere speculation that it is inappropriate. Permitting reimbursement under those circumstances frustrates the policy of mainstreaming disabled children whenever possible.

IV. The Ninth Circuit's Holding Is In Conflict With This Court's Spending Clause Decisions Because The IDEA Does Not Provide Clear Notice Of The States' Obligation To Provide Private School Tuition For Students Who Have Not Previously Received Special Education And Related Services From The Public Agency.

The IDEA was enacted by Congress pursuant to the Spending Clause. *See Schaffer v. Weast*, 546 U.S. 49, 51 (2005). Consistent with this Court's Spending Clause

public educational agencies without allowing those agencies the opportunity to resolve the parents' complaint.

jurisprudence, when Congress attaches conditions to a state's acceptance of federal funds, those conditions must be unambiguously set out, *Arlington*, *supra*, 548 U.S. 291, because a law "that conditions an offer of federal funding on a promise by the recipient . . . amounts essentially to a contract between the Government and the recipient of funds." *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274 (1998).

The Court has noted that "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Pennhurst State Sch. And Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Accordingly, a court must narrowly interpret Spending Clause legislation, so that States are not burdened with unanticipated obligations. *Cedar Rapids Community School District v. Garret F.*, *supra*, 526 U.S. at 84.

Two principles made clear in this Court's decisions interpreting the IDEA are particularly relevant in this case. First, where a possible interpretation of the IDEA would result in a determination that a "distinct class of people has independent, enforceable rights" and "results in a change to the States' statutory obligations," the IDEA must be read in accordance with the Spending Clause requirement that it provide clear notice of the States' obligation. *Winkelman v. Parma City School District*, 550 U.S. 516, 534 (2007). In *Winkelman*, the Court held that the IDEA grants parents of disabled children the independent right to sue school districts for violations of the IDEA. In so doing, the Court rejected the *Winkelman* respondent's argument that the IDEA was ambiguous as to whether parents had an independent right to sue and that therefore the Court's spending clause jurisprudence prohibited an interpretation granting parents such a right. The Court distinguished the situation from its decision in *Arlington*, 548 U.S. 291, in

which the Court applied the clear notice rule in deciding that the IDEA does not require States to reimburse experts' fees to prevailing parties in IDEA actions. The Court pointed out that in *Arlington*, the question was whether "IDEA 'furnishes clear notice regarding the liability at issue.'" 505 U.S. at 534, *quoting Arlington*, 548 U.S. at 296. In *Winkelman*, however, the issue did not involve the creation of a new right or state liability, but only who could sue to enforce already existing rights under the IDEA. 505 U.S. at 534.

This Court's decisions, then, establish that the clear notice rule applies if an interpretation of a Spending Clause statute such as the IDEA will impose a "substantive condition or obligation on States that they would not otherwise be required by law to observe." *Id.* Here, as the City of New York's experience demonstrates, the Ninth Circuit's interpretation of the statute would impose upon States the obligation to pay private school tuition for a class of students who otherwise would not receive such payment. Thus, the statute must be viewed through the lens of this Court's Spending Clause jurisprudence.

Second, as the Court stated in *Arlington*, "[t]he IDEA obviously does not seek to promote [its] goals at the expense of all other considerations, including fiscal considerations." 548 U.S. at 303. In reaching its decision, the Ninth Circuit "emphasize[d] in particular that the express purpose of the IDEA is 'to ensure that *all* children with disabilities have available to them a free appropriate public education.'" 523 F.3d at 1087, *quoting* 20 U.S.C. § 1400(d)(1)(A)(emphasis in original). This broad goal does not trump the serious financial consequences of the Ninth Circuit's interpretation, such as those experienced by the City of New York, and does not lessen the need for the statute to provide clear notice to States of their obligation to pay private school tuition even to students who have not previously received special education and related services

under the authority of a public agency. *See Arlington*, 548 U.S. at 303.

In the instant case, the Ninth Circuit's decision is inconsistent with this Court's recent decision in *Arlington, supra*. The Ninth Circuit left that decision unmentioned and, indeed, made no mention at all of the Spending Clause. This was error.

If, as the Ninth Circuit reasoned, the language of 20 U.S.C. § 1412 (a)(10)(C)(ii) is ambiguous in light of the potential relief available under §1415(e)(2), that ambiguity defeats any claim that Congress unambiguously conditioned the receipt of federal funds on potential liability to pay private school tuition for students who had never received special education and related services from the public agency. An ambiguous statute by definition does not provide clear notice of the States' liability. States could not knowingly accept conditions of which they are unaware or which they are unable to ascertain.

It is appropriate to view the IDEA from the perspective of a state official who would decide whether the State should accept IDEA funds and the obligations accompanying the acceptance of those funds. *Arlington, supra*. The question here is whether such a state official would clearly understand that one of the obligations imposed by the IDEA is an obligation to reimburse parents who unilaterally place their children in private school when those children have never previously received special education and related services from the local educational agency.

It is respectfully submitted that no clear notice of such an obligation is provided by the Act. The language of 20 U.S.C. § 1412 (a)(10)(C)(ii) does not even hint that the acceptance of IDEA funds made local educational agencies responsible for reimbursing parents who unilaterally place their children in private schools when the children have never received special education and related services from

the public agency. And the text of 20 U.S.C. § 1415 (e)(2), which does not mention tuition reimbursement, also fails to provide the clear notice that is required under the Spending Clause to attach such a condition to a State's receipt of IDEA funds. Since the statute does not clearly impose that obligation, the Court's Spending Clause jurisprudence prohibits it.

States could not anticipate having to incur the enormous economic impact of having to reimburse parents who unilaterally placed their disabled children in private schools without having first afforded the local educational agency an opportunity to provide a free appropriate public education, especially where the plain language of the statute provides that the child must have previously received special education and related services from the public agency in order for the parent to be eligible for tuition reimbursement. Given the magnitude of the potential economic impact upon the States if a parent may unilaterally place a child in private school and seek tuition reimbursement even though the child has not previously received special education and related services from the local educational agency, it cannot be presumed that the States would have knowingly and voluntarily accepted such an obligation. *See Pennhurst, supra*, 451 U.S. at 17.

In sum, the plain language and legislative history demonstrate that Congress did not intend to impose burdens of unspecified proportions and weight upon the States in enacting the IDEA. *See Rowley, supra*, 458 U.S. at 176. It is respectfully submitted that the statute on its face requires that the child must have previously received special education and related services from the public agency in order for the parent to be eligible to receive tuition reimbursement for the child's private education. Accordingly, the Court should interpret 20 U.S.C. § 1412(a)(10)(C)(ii) in accordance with its plain language and the constitutionally mandated principles of construction applicable to Spending Clause legislation.

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
100 Church Street,
New York, New York 10007.
(212) 788-1613 or 0835

LEONARD J. KOERNER,*
MICHAEL BEST,
EDWARD F.X. HART,
DRAKE A. COLLEY,
of Counsel.

**Counsel of Record*

Dated: March 2, 2009

AMICUS CURIAE BRIEF

No. 08-305

IN THE

Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,
Petitioner,

v.

T.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES IN SUPPORT OF RESPONDENT

ANKUR J. GOEL
Counsel of Record
TAMU K. FLOYD
JOHN H. WALKER
MCDERMOTT WILL & EMERY LLP
600 13th Street, N.W.
Washington, D.C. 20005
(202) 756-8000
Counsel for Amicus Curiae

April 1, 2009

TABLE OF CONTENTS

Page

INTERESTS OF AMICUS 1

SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. The Pennhurst Canon of Statutory Construction Does Not Apply to the Question at Hand. 5

A. The Pennhurst Canon of Statutory Construction Applies in Limited Situations and Does Not Extend to Require Congress to Specify Every Detail. 5

B. States Are Generally on Notice that Courts Have the Power to Craft an Appropriate Remedy When a Clearly-Noted Federal Right Has Been Violated. 10

II. Analysis of Congress's Spending Clause Power Must Consider the Role of and Statements from the Coordinate Branches of Government. 13

A. Congress Necessarily Legislates Broadly.....13

B. The Courts and the Department of Education Have Specified That Tuition Reimbursement is an Available Remedy.....14

III. Because the IDEA Was Enacted Pursuant to Both the Spending Clause and Section Five of the Fourteenth Amendment, Any Application of Pennhurst Must Be Limited. 20

CONCLUSION 27

TABLE OF AUTHORITIES

CASES

Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006) ..... passim

Barnes v. Gorman, 536 U.S. 181 (2002) 6, 9, 11, 12

Bell v. Hood, 327 U.S. 678 (1946) 11

Bell v. New Jersey, 461, U.S. 773 (1983) 12

Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley, 458 U.S. 176, 198 (1982) 22, 23

Cedar Rapids Comm. Sch. Dist. v. Garret F., 526 U.S. 66 (1999) 7

Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 19

Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) 7, 9

Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993) 7, 15

Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992) 7, 9, 11

Fullilove v. Klutzinck,
448 U.S. 448 (1980).....20, 21

Gebser v. Lago Vista Indep. Sch. Dist.,
524 U.S. 274 (1998).....7

Gonzaga Univ. v. Doe,
536 U.S. 273 (2002).....7

Jackson v. Birmingham Bd. of Ed.,
544 U.S. 167 (2005).....6, 7, 16, 18

Koons Buick Pontiac GMC, Inc. v. Nigh,
543 U.S. 50 (2004).....16

MidAtlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.,
474 U.S. 494 (1986).....16

Mills v. Bd. of Educ. of Dist. of Columbia,
348 F. Supp. 866 (D.D.C. 1972).....24

Mistretta v. United States,
488 U.S. 361 (1989).....13

Pa. Ass'n for Retarded Children v. Pennsylvania,
334 F. Supp. 1257 (E.D. Pa. 1971).....24

Pa. Ass'n for Retarded Children v. Pennsylvania,
343 F. Supp. 279 (E.D. Pa. 1972).....24

Pennhurst State Sch. & Hosp. v. Halderman,
451 U.S. 1 (1981).....passim

Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,
547 U.S. 47 (2006).....21

Sch. Comm. of Burlington, Mass. v. Dep't of Educ. of Mass.,
471 U.S. 359 (1985).....passim

Schaffer v. Weast,
546 U.S. 49 (2005)..... .....7, 20

Smith v. Robinson,
486 U.S. 992 (1984).....8, 22, 23

South Dakota v. Dole,
483 U.S. 203 (1987).....9

Sullivan v. Little Hunting Park, Inc.,
396 U.S. 229 (1969).....11

Winkelman ex rel. Winkelman v. Parma City Sch. Dist.,
550 U.S. 516 (2007).....7

STATUTES

20 U.S.C. § 1400(c)(2)(B).....24

20 U.S.C. § 1400(c)(6) 23

20 U.S.C. § 1400(c)(7) 23

20 U.S.C. § 1402(a).....19

20 U.S.C. § 1406(b) 19

20 U.S.C. § 1412(a)(1)(A) 10

20 U.S.C. § 1415(e)(2) 15

20 U.S.C. § 1415(i)(2)(C)(iii) 10, 16

OTHER AUTHORITIES

150 Cong. Rec. S. 5250 (daily ed. May 12, 2004 (statement of Sen. Harkin) 24

150 Cong. Rec. S. 5394, 5408 (daily ed. May 13, 2004) (statement of Sen. Bingaman) 24

24 Richard A. Lord, Williston on Contracts § 64:2 (4th ed. 2002) 12

American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) 14

Application of a Child with a Disability, Appeal No. 06-021 (Apr. 25, 2006), *available at* http://www.sro.nysed.gov/2006/06-021.htm. 18

Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12,406 (Mar. 12, 1999) 4

Letter from the Department of Education to Susan Luger, listed in 65 Fed. Reg. 9178 (Feb. 23, 2000) 18

S. Rep. No. 94-168 (1975), as reprinted in 1975 U.S.C.C.A.N. 1425 ..... 22, 23, 24, 25

U.S. CONST. amend. XIV, §§ 1, 5 21

INTERESTS OF AMICUS

The Council of Parent Attorneys and Advocates is an independent, nonprofit organization of 1,200 attorneys, advocates, and parents in 47 States and the District of Columbia who are routinely involved in special education due process hearings throughout the country.[1]

SUMMARY OF ARGUMENT

Petitioner's heavy reliance on this Court's holding in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), would require Congress—and Congress alone—to specify each and every detail, no matter how small, in legislation enacted under the Spending Clause. Nothing in this Court's decisional history supports this expansion of *Pennhurst*.

1a. This Court's cases have applied a "clear-notice" canon of statutory construction where the condition at issue is fundamental and arguably material to a State's decision whether or not to accept federal funds. In keeping with this reasoning, this Court has applied *Pennhurst* where the question at issue was whether to apply or extend an implied right of action, or whether to

---

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

impose extraordinary relief beyond ordinary contract-style remedies.

This Court has described *Pennhurst* as implementing a contract-law analogy. Although the analogy is imperfect, even contracts do not attempt to address every last permutation of every last factual circumstance. Contracts do not typically spell out each and every available remedy, for example, and they rely on background common-law principles. Moreover, even in contracts, only a few terms are considered "material" such that a breach is grounds for rescinding a contract.

The *Pennhurst* doctrine's contract-law analogy is designed to protect States' ability to make reasoned judgments about whether to accept funds. Of course, contracts impose bilateral obligations. *Pennhurst* is not a license for States to accept funds from the federal government, and subsequently avoid or evade IDEA's basic obligations by conducting a post-hoc search for areas where the State may assert a purported failure of clarity in the text of the statute. *Pennhurst* allows States, having accepted the funds, to raise questions only about terms that are so fundamental that they would reasonably have affected the State's decision to accept money—not about every subsidiary detail.

Petitioner's argument would effectively require Congress to include in its Spending Clause enactments clauses that address every permutation of every factual situation that may arise, to an even greater extent than contracts attempt to do. No contract—and certainly no statute—can cover every specific factual circumstance

or articulate every available remedy and the circumstances in which each of those remedies will be available.

1b. As this Court has noted, States are generally on notice that when they violate a protected individual's clearly-noted federal right, they expose themselves to an appropriate compensatory remedy. The determination of the appropriate ordinary, compensatory remedy is an issue of statutory interpretation and judicial remedial power, not notice. While courts may be required under the *Pennhurst* canon of statutory construction to find clear notice to States that they are subject to extraordinary forms of relief that are not tailored to compensating for the injury suffered as a result of the federal-right violation (such as punitive measures), this Court has previously held that States are on notice of the background principle that violations give rise to ordinary contract-style compensatory remedies. Congress need state nothing further.

2. In any event, the statutory language, combined with the pronouncements from this Court and the executive branch, set forth the availability of tuition reimbursement in cases such this, thus providing clear notice to the States. Having accepted funds with knowledge of the interpretations of the coordinate branches of government, States should not now be able to assert that they did not anticipate being responsible for tuition reimbursement in cases such as the one presented here.

Congress has the legal authority and the practical need to rely on administrative agencies and courts to clarify details of the conditions that States accept along with federal funds. This Court should continue to apply the clear-notice canon of statutory construction in a way that preserves this authority. Here, both the Department of Education and this Court have spoken on the statutory text at issue. In *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985), this Court held that courts have broad authority under the IDEA to craft any remedy in keeping with the purposes of the Act. The Department of Education, following Congress's 1997 amendment of the Act, expressed its interpretation of the statute and of its own regulations, that *Burlington* continues to apply to allow courts to grant students private school tuition reimbursement, even where the student had not previously received special education services from a state agency. *See* Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12,406, 12,602 (Mar. 12, 1999). This Court should recognize that Congress appropriately relies on the coordinate branches of government, and that pronouncements from those branches of government as to the scope of the statute are relevant to any assessment of the scope of the statute and to the States' reasonable expectations.

3. The Court should also be mindful of the dual authorities under which Congress enacted the IDEA: the Spending Clause of Article 1 and Section 5 of the Fourteenth Amendment. Where Congress utilizes an

amalgamation of its legislative authorities, as is the case with the IDEA, this Court must interpret the legislation in a manner that preserves each of Congress's constitutional authorities. The concerns of the clear-notice canon under the Spending Clause must be balanced with the fact that Congress exercised its Fourteenth Amendment enforcement authority while also providing financial assistance to States. In that context, an expansive application of *Pennhurst* would intrude on, and undermine, Congress's exercise of its Fourteenth Amendment authority.

ARGUMENT

I. THE *PENNHURST* CANON OF STATUTORY CONSTRUCTION DOES NOT APPLY TO THE QUESTION AT HAND.

A. The *Pennhurst* Canon of Statutory Construction Applies in Limited Situations and Does Not Extend to Require Congress to Specify Every Detail.

Petitioner places heavy emphasis on the purported constraints imposed by the IDEA's status as Spending Clause legislation. Petitioner asserts that Congress is bound to expressly state, in the statute itself, each and every detail surrounding the statute. Pet. Br. at 27-28. Petitioner's proposed expansion of *Pennhurst*'s canon of statutory interpretation imposes an unworkable burden on Congress, and is inconsistent with *Pennhurst*'s underlying principles.

In *Pennhurst State School & Hospital v. Halderman* this Court announced a rule of "statutory construction" recognizing that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." 451 U.S. 1, 17 (1981). In order to ensure that the States accept those conditions "voluntarily and knowingly," Congress must impose the condition "unambiguously." *Id.*

The *Pennhurst* principle does not require notice of everything. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005) (holding that Congress is not required "specifically" to "identify" and "proscribe each condition in [Spending Clause] legislation"). And this Court has denied a strict application of contract-law principles to federal spending legislation. *See Barnes v. Gorman*, 536 U.S. 181, 188-89 (2002) (rejecting the proposition that "suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise").

Rather, *Pennhurst*'s application depends on the issue at hand. It necessarily applies with greater force when the condition at issue is fundamental and arguably material to a State's decision to accept federal funds. In *Pennhurst*, the Court noted that the canon of statutory construction "applies with greatest force where . . . a State's potential obligations under the Act are largely indeterminate." 451 U.S. at 24. As such, this Court has applied *Pennhurst* mostly in situations where the question at issue had broad implications for the State's potential exposure, including a number of cases

addressing the availability or scope of an implied private right of action.[2] The IDEA, by contrast, sets out the substantive conditions that the States must fulfill, and expressly provides a private right of action. If *Pennhurst* presented the circumstance in which the canon had the greatest force, this case—involving the limited question of whether reimbursement for private school tuition is available in a limited factual scenario—presents a circumstance in which the canon has the least force. Indeed, this Court has rarely applied *Pennhurst* when interpreting the IDEA. *See, e.g., Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005); *Cedar Rapids Comm. Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S.

---

[2] *See, e.g., Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (whether Title IX's implied private right of action extends to claims of retaliation against individual because he has complained about sex discrimination); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (whether there exists private enforceable rights under § 1983 in federal statute that concerns administrative enforcement and does not confer monetary entitlement on litigant); *Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) (whether Title IX's implied private right of action against funding recipients for their own misconduct extends to encompass liability for student-on-student sexual harassment); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (whether Title IX's implied private right of action can be brought against a school district for teacher-student sexual harassment); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992) (whether Title IX's implied private right of action entitles plaintiffs to money damages).

359 (1985); *Smith v. Robinson*, 486 U.S. 992 (1984). The exception to this trend is *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006); but, as explained in Subpart B, the Court's ruling in that case is distinguishable from the case at hand.

Pennhurst's analogy to contract law is consistent with considering the breadth of the question being presented to determine whether Congress must provide explicit notice on the issue. Although the analogy is imperfect, even contracts do not attempt to address every last permutation of every last factual circumstance. For example, contracts do not typically spell out each and every available remedy, and they rely on background common-law principles as default rules. Moreover, in contracts, only a few terms are considered "material" such that they affect the underlying validity of the contract. *See* 23 Richard A. Lord, Williston on Contracts § 63.1 (4th ed. 2002). The *Pennhurst* doctrine is, at its core, designed to address the underlying validity of the relationship entered into between the federal government and the States. *Pennhurst* is premised on the Court's view of the need for States' to be able to make reasoned judgments about whether to accept federal funds. Having accepted the funds, *Pennhurst* allows States to raise questions about terms that are so fundamental that they would reasonably have affected the State's decision to accept money—not questions about every subsidiary detail. *Pennhurst* is not a license for States to accept funds from the federal government, and subsequently avoid or evade IDEA's basic obligations on the ground of an asserted failure of clarity in the text of the statute.

Petitioner's argument would effectively require Congress to include in its Spending Clause enactments clauses that address every permutation of every factual situation that may arise, to an even greater extent than contracts attempt to do. No contract—and certainly no statute—can possibly cover every specific factual circumstance or articulate every available remedy and the circumstances in which those remedies will be available. Requiring Congress to do so would severely undermine Congress's accepted Constitutional authority to promote the general welfare by attaching conditions to the exercise of its Spending Clause authority. *See South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

The issue in this case falls well short of the kind of broad, fundamental issue for which the "clear-notice" principle applies. This case does not involve a question of whether acceptance of the federal funds subjects the recipients to implied rights of action by private parties, *cf. Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992); it does not concern whether these implied rights of action extend to new, previously unaddressed types of conduct, *cf. Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) (applying *Pennhurst* to determine whether Title IX's implied private right of action against funding recipients for their own misconduct extends to encompass liability for student-on-student sexual harassment); and it does not involve questions as to whether, in such lawsuits, the extraordinary remedy of punitive damages may be available, *cf. Barnes v. Gorman*, 536 U.S. 181 (2002).

Instead, the issue here is narrow. It is undisputed that IDEA requires Petitioner to identify children with

disabilities and to provide a free appropriate public education, 20 U.S.C. § 1412(a)(1)(A); that the failure to do so is a breach of its obligations under IDEA; and that courts are explicitly authorized to remedy such violations, 20 U.S.C. § 1415(i)(2)(C)(iii). The only question is whether, in the limited instance in which a school district fails to identify a child with a disability and the child accordingly has not previously received special education services from the school district, the district may avoid responsibility for its failure to provide the services required by IDEA. Whatever the answer to this question,[3] it is a matter of ordinary statutory interpretation; *Pennhurst*'s canon of statutory construction need not be pressed into service.

B. States Are Generally on Notice that Courts Have the Power to Craft an Appropriate Remedy When a Clearly-Noted Federal Right Has Been Violated.

In the context of the IDEA, Congress has expressly set detailed substantive standards and conditions, requiring school districts to identify children with disabilities and to provide those children with a free appropriate public education. Moreover, Congress expressly gave students and parents authority to vindicate the rights created by the statute through an administrative hearing process and subsequent federal court action. To the extent *Pennhurst* requires it, States are generally on notice that they are subject to the broad

---

[3] Amicus agrees with Respondent that the IDEA provides tuition reimbursement as an available remedy in the circumstances presented by this case.

power of federal courts to award all necessary and appropriate contract remedies where a federal statutory right has been violated.

"[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done," *Bell v. Hood*, 327 U.S. 678, 684 (1946), and the "existence of a statutory right implies the existence of all necessary and appropriate remedies," *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969) (citations omitted). Generally, "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Franklin*, 503 U.S. at 70-71.

In applying the *Pennhurst* principles to Spending Clause legislation, this Court's cases have recognized that Congress need not specify ordinary remedies. In light of the broad power of federal courts to fashion appropriate remedies for violation of federal rights, this Court has held that "[a] funding recipient is generally on notice that it is subject *not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract.*" *Barnes*, 536 U.S. at 187 (emphasis added). Congress is therefore under no obligation to provide explicit notice to States of the ordinary contract remedies to which they may be subject.

This Court has applied *Pennhurst* to preclude only extraordinary relief that does not directly address the

harm suffered by the individual whose federal right has been violated, where such relief has not been expressly specified by Congress. Thus in *Barnes v. Gorman*, this Court held that a State could not be subject to punitive damages where Congress had not expressly provided for such extraordinary measures in the statute. 536 U.S. at 187. And in *Arlington Central School District Board of Education v. Murphy*, this Court alluded to the Spending Clause—though it was not central to the Court's holding—in concluding that the a the unusual act of fee-shifting to allow for expert witness fees—a form of relief not ordinarily available in federal court—was not within the definition of "costs" in the IDEA. 548 U.S. at 302-03. The clear-notice canon does not, however, require Congress to state with clarity the kind of standard remedy at issue in this case. *See Bell v. New Jersey*, 461 U.S. 773, 790 n.17 (noting that *Pennhurst* does not necessarily apply to legislation setting forth "the remedies available against a noncomplying state").

Private school tuition reimbursement is a standard, contract-law remedy. It satisfies the expectation interests of the student by placing him in as good a position as he would have been in had the school district fulfilled its federal obligation to provide a free appropriate public education. *See* 24 Richard A. Lord, Williston on Contracts § 64:2 (4th ed. 2002). It is therefore distinguishable from forms of relief such as the punitive damages at issue in *Barnes* and the fee-shifting measure at issue in *Arlington*. Neither punitive damages nor expert witness fees are remedies sounding in contract. Private school tuition reimbursement is, and *Pennhurst* does not require Congress to clearly state its availability. Indeed, in originally recognizing private

school tuition reimbursement as an appropriate remedy under the IDEA, this Court conducted no Spending Clause analysis at all. *See Burlington*, 471 U.S. 359.

II. ANALYSIS OF CONGRESS'S SPENDING CLAUSE POWER MUST CONSIDER THE ROLE OF AND STATEMENTS FROM THE COORDINATE BRANCHES OF GOVERNMENT.

A. Congress Necessarily Legislates Broadly.

By requiring an undue level of specificity in Spending Clause legislation, Petitioner's approach would effectively deprive Congress of its recognized authority to delegate to federal agencies "the sort of intricate, labor intensive task for which delegation to an expert body is especially appropriate," *Mistretta v. United States*, 488 U.S. 361, 379 (1989), and to "obtain[] the assistance" of the Executive Branch of government in articulating the conditions that attach to the grant of federal funds, *id.* at 372. Indeed, "[o]nce it is conceded, as it must be, that no statute can be entirely precise, and that some judgments . . . must be left to the officers executing the law and to the judges applying it," *id.* at 415 (Scalia, J. concurring), applying *Pennhurst*'s clear-notice requirement to every instance of Spending Clause statutory interpretation would seriously undermine Congress's ability to exercise its constitutionally assigned duties.

Petitioner's assertion that *Pennhurst* requires Congress to specify with precision, in the statute itself, the precise circumstances in which an ordinary remedy

is available for an admitted breach, imposes an unworkable standard and implies that interpretations and conditions set out by the executive branch, and known to the States when they made the decision to accept the funds Congress offered to them, have no legal bearing. This position is untenable and would effectively deprive Congress of the ability to enact Spending Clause legislation and delegate to the executive branch the authority to fill in the details, even as Congress has recently passed legislation providing significant funding to States and localities with conditions to be specified by the executive branch. *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

B. The Courts and the Department of Education Have Specified That Tuition Reimbursement is an Available Remedy.

Petitioner relies heavily on the text of the statute in conducting its *Pennhurst* analysis. *See* Pet. Br. 23-25. As discussed above, however, this Court has recognized the important role of courts and administrative agencies. This Court and the executive branch have set forth States' obligations with precision, and the States were on notice of them. Having accepted funds with knowledge of the interpretations of the coordinate branches of government, States cannot now assert that they did not anticipate being responsible for tuition reimbursement in cases such as the one presented here.

In *School Committee of Town of Burlington, Massachusetts v. Department of Education of Massachusetts*, 471 U.S. 359 (1985), this Court held that, under § 1415(e)(2) of the IDEA, parents are entitled to be reimbursed for reasonable costs of a unilateral placement where a free appropriate public education is not available and the alternate placement is ultimately determined to be proper. In reaching this conclusion, the Court noted that the statute

> confers broad discretion on the court. The type of relief is not further specified, except that it must be "appropriate." Absent other reference, the only possible interpretation is that the relief is to be "appropriate" in light of the purposes of the Act.

Id. at 369. The Court noted that an injunction directing a school district to develop an appropriate individualized education program ("IEP") is not likely to be effective because a final judicial decision is likely to come "a year or more after the school term covered by that IEP has passed." *Id.* at 370.

The Court subsequently confirmed this decision in *Florence County School District Four v. Carter*, 510 U.S. 7, 15 (1993) ("[O]nce a court holds that the public placement violated IDEA, it is authorized to 'grant such relief as the court determines is appropriate.'") (quoting 20 U.S.C. § 1415(e)(2)). This line of authority has stood for over twenty years.

The statutory language, combined with the consistent case law interpreting it as authorizing tuition reimbursement as a remedy for violations, is more than sufficient to establish that States had "clear notice" not only of their obligation to provide a free appropriate public education, but also the potential that school districts would be liable for the costs of private school tuition. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 182 (2005) (finding that the Board of Education was on notice of its liability based on decisions of the U.S. Supreme Court and federal appellate courts); *see also Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 303 (2006) (relying on the Court's prior case law to conclude that States did not have clear notice).

Congress may, of course, overrule or alter the Court's interpretations of statutory language; however, the Court presumes that if Congress "intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *MidAtlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986). If Congress had intended to repeal the longstanding interpretation of IDEA reflected in *Burlington* and *Carter*, it "likely would have flagged that substantial change." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 62 (2004). Congress did not indicate any such intent. Congress did not revise the text of § 1415(i)(2)(C)(iii), which remains unchanged from the language this Court interpreted in *Burlington* and *Carter*. Neither the text nor the legislative history of the 1997 amendments mentions any intent to eliminate the Court's ability to order tuition reimbursement in appropriate cases in which a child had

not previously received special education and related services from a school district.

After the 1997 amendments, the United States Department of Education expressly considered and rejected the very argument that Oregon makes in this case, and told States seeking federal funding that they could continue to be liable for tuition reimbursement. The Department said in the comments to regulations that:

> [H]earing officers and courts retain their authority recognized in *Burlington* and [*Carter*] to award "appropriate" relief if a public agency has failed to provide FAPE, *including reimbursement and compensatory services*, under section 615(l)(2)(B)(iii) *in instances in which the child has not yet received special education and related services*. This authority is independent of their authority under section 612(a)(10)(C)(ii) to award reimbursement for private placements to children who previously were receiving special education and related services from a public agency.

Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12,406, 12,602 (March 12, 1999) (emphasis added).

The Department of Education reiterated this view in a published letter stating that "[w]e do not view 612(a)(10)(C) as foreclosing categorically an award of

reimbursement in a case in which a child has not yet been enrolled in special education and related services under the authority of a public agency." *See* Letter from the Department of Education to Susan Luger, listed in 65 Fed. Reg. 9178 (Feb. 23, 2000) and quoted in *Application of a Child with a Disability*, Appeal No. 06-021 (Apr. 25, 2006), *available at* http://www.sro.nysed.gov/2006/06-021.htm.

This Court has previously taken into account the statements of the executive-branch agency charged with administering the statute. In *Pennhurst*, this Court signaled the relevance of statements from the executive branch by concluding that:

> it strains credulity to argue that participating States should have known of their 'obligations' under Section 6010 when the Secretary of HHS . . . has never understood Section 6010 to impose conditions on participating States.

Id. at 25.

In *Jackson* this Court concluded that grant recipients were on notice of the relevant obligations, based in part on the existence of administrative regulations promulgated by the Department of Education in the Title IX context. 544 U.S. at 182. In *Arlington*, the Court implicitly suggested that an executive branch agency's statements could provide the required notice. In that case, the Court concluded that a statement by the Government Accountability Office was not relevant to the "clear notice" analysis, in part because it was made

"by an agency not responsible for implementing the IDEA." *Arlington*, 548 U.S. at 303 n.3.

In this instance, Congress charged the U.S. Department of Education with administering and enforcing IDEA. 20 U.S.C. § 1402(a). The Department of Education concluded that Congress had not eliminated the courts' ability to remedy violations when a child with disabilities had not previously received special education services from the State, 20 U.S.C. § 1406(b), and announced this interpretation in the Federal Register for all States and school districts to see.

As a result, Oregon accepted federal funds with full notice that the Court and the Department of Education—the executive branch agency to which Congress delegated authority to implement IDEA, and to which this Court defers in reasonable interpretations of federal statutes, *see, e.g., Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)—had concluded that courts could continue to remedy school districts' violations of the IDEA by ordering the district to reimburse private school tuition.

In the face of the statute's broad remedial provision, this Court's case law interpreting that provision, and the explicit statement by the U.S. Department of Education, a reasonable State and school district would have understood that they would be liable for tuition reimbursement in the circumstances presented in this case.

III. BECAUSE THE IDEA WAS ENACTED PURSUANT TO BOTH THE SPENDING CLAUSE AND SECTION FIVE OF THE FOURTEENTH AMENDMENT, ANY APPLICATION OF *PENNHURST* MUST BE LIMITED.

Petitioner also disregards Congress's independent, underlying authority to enact the IDEA pursuant to Section 5 of the Fourteenth Amendment. This Court has recognized that Congress may use more than one constitutional provision as the source of its legislative authority. *See Fullilove v. Klutzinck*, 448 U.S. 448, 473 (1980) ("In enacting the [Minority Business Enterprise] provision [of the Public Works Employment Act], it is clear that Congress employed an amalgam of its specifically delegated powers," including its spending power and its enforcement power.). Congress exercised its authority under Section 5 of the Fourteenth Amendment to the Constitution to enact legislation enforcing equal educational opportunity for children with disabilities. Thus, this Court should apply *Pennhurst* in a manner that recognizes and preserves Congress's power to legislate pursuant to the Fourteenth Amendment.

In addition to recognizing that IDEA was enacted pursuant to Congress' authority under the Spending Clause, *see, e.g.*, *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 51 (2005), this Court has previously recognized that the IDEA was also an exercise of Congress' Fourteenth Amendment authority. The Fourteenth Amendment protects individual rights to equal protection of the law against violation by state actors.

Section 5 gives Congress the power to enforce the provisions of the Amendment.[4]

Congress may employ "an amalgam of its specifically delegated powers," *Fullilove*, 448 U.S. at 473, and may impose conditions in connection with the exercise of its spending authority that are within other legislative authorities. *See, e.g., Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* ("*FAIR*"), 547 U.S. 47, 58 (2006) ("Although Congress has broad authority to legislate on matters of military recruiting, it nonetheless chose to secure campus access for military recruiters indirectly, through its Spending Clause power."). In *FAIR*, the Court granted its traditional deference to Congress in military matters, even though the statute at issue was also enacted under the Spending Clause. *Id.*

In this instance, Congress utilized an amalgamation of its Spending Clause and Fourteenth Amendment

---

[4] The Fourteenth Amendment provides in relevant part:

> Section 1 . . . No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.
>
> ***
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV, §§ 1, 5.

authorities in enacting the IDEA and its predecessor, the Education of the Handicapped Act ("EHA"); as a result, a stringent application of the clear-notice canon of statutory construction is particularly unwarranted.

As the Court observed in *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley*, "Congress sought 'to provide assistance to the States in carrying out their responsibilities under . . . the Constitution of the United States to provide equal protection of the laws.'" 458 U.S. 176, 198 (1982) (quoting S. Rep. No. 94-168 at 13 n.22 (1975)). This Court further recognized the Fourteenth Amendment underpinnings of the statute two years later in *Smith v Robinson*, 468 U.S. 992, 1009 (1984) ("We have little difficulty concluding that Congress intended the EHA to be the exclusive avenue through which a plaintiff may assert an *equal protection claim* to a publicly financed special education.") (emphasis added); *see also Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 305 (2006) (Ginsburg, J., concurring) ("IDEA was enacted not only pursuant to Congress' Spending Clause authority, but also pursuant to § 5 of the Fourteenth Amendment."). In *Smith*, the Court explained that the EHA was

> an attempt to relieve the fiscal burdens placed on States and localities by their responsibility to provide education for all handicapped children. At the same time, however, *Congress made clear that the EHA is not simply a funding statute. The responsibility for providing the required education remains on the States.* And the Act establishes an

> enforceable substantive right to a free appropriate public education.

Smith, 468 U.S. at 1010 (citing S. Rep. No. 94-168, at 6 (1975) and *Rowley*, 458 U.S. 176 (1982)) (emphasis added). The EHA was a "comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children." *Id.* at 1009.

Congress's reliance on the Fourteenth Amendment is reflected in the history and text of the IDEA. Specifically, Congress found that

> [w]hile States, local education agencies, and educational service agencies are primarily responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and *to ensure equal protection of the law.*

20 U.S.C. § 1400(c)(6) (emphasis added); *see also id.* § 1400(c)(7) ("A more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an *equal educational opportunity* for all individuals.") (emphasis added). Congress acknowledged that it must

> take a more active role under its responsibility for equal protection of the

> laws to guarantee that its responsibility for *equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity.*

S. Rep. No. 94-168, at 9 (1975), as reprinted in 1975 U.S.C.C.A.N. 1425, 1433 (emphasis added).

In enacting the statute in 1975, Congress cited the landmark cases, *Pennsylvania Association for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D.Pa. 1971) and 343 F. Supp. 279 (E.D. Pa. 1972), and *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), which applied the Fourteenth Amendment to require the provision of an appropriate public education to children with disabilities. Prior to the enactment of the EHA, one million children with disabilities were entirely excluded from public schools. 150 Cong. Rec. S. 5250, 5326 (daily ed. May 12, 2004 (statement of Sen. Harkin); *see also* 20 U.S.C. § 1400(c)(2)(B); 150 Cong. Rec. S. 5394, 5408 (daily ed. May 13, 2004) (statement of Sen. Bingaman).

At the time it enacted the EHA, Congress noted that

> this Nation has long embraced a philosophy that *the right to a free appropriate public education is basic to equal opportunity* and is vital to secure the future and the prosperity of our people. It is contradictory to that philosophy when that right is not assured equally to all groups of people within the Nation. Certainly the failure to provide a right to

> education to handicapped children cannot be allowed to continue.

S. Rep. No. 94-168, at 9 (1975), as reprinted in 1975 U.S.C.C.A.N. 1425, 1433 (emphasis added).

The Court should apply the *Pennhurst* clear-notice canon in a manner that will preserve Congress' ability to exercise its Fourteenth Amendment authority. In *Pennhurst*, the Court noted that legislation enacted pursuant to the enforcement power of the 14th Amendment imposes *involuntary* obligations on States, in contrast to obligations voluntarily assumed by accepting federal funds. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981).

> Unlike legislation enacted under § 5, however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State *voluntarily and knowingly* accepts the terms of the "contract."

Id. at 17 (emphasis added). Here, Congress chose to use its Spending Clause authority to assist in the enforcement of the Fourteenth Amendment.

The Fourteenth Amendment adds an additional essential "layer" to IDEA that is not present in pure Spending Clause legislation. Where Congress chooses

to provide funding to assist States in meeting the requirements of the Fourteenth Amendment, the rationale for *Pennhurst's* clear-notice rule must be reconciled with Congress's authority to impose obligations on the States through its Fourteenth Amendment powers. If the Court were to apply *Pennhurst* as if this were strictly a Spending Clause case, it would unduly constrain Congress' ability to provide financial assistance to States to assist them in meeting obligations that Congress could have imposed directly.

CONCLUSION

For the foregoing reasons, amicus requests that this Court affirm the decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

ANKUR J. GOEL
Counsel of Record
TAMU K. FLOYD
JOHN H. WALKER

MCDERMOTT WILL & EMERY LLP
600 13th Street, N.W.
Washington, D.C. 20005
(202) 756-8000

Counsel for Amicus Curiae

Dated April 1, 2009

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
MAR 6 - 2009
OFFICE OF THE CLERK

122 (8)

No. 08-305

IN THE
Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,
Petitioner,

v.

T.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE COUNCIL OF THE GREAT CITY SCHOOLS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

PAMELA A. HARRIS
SHANNON M. PAZUR
ALLISON ORR LARSEN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

JULIE WRIGHT HALBERT
(Counsel of Record)
SUE GAMM
COUNCIL OF THE GREAT CITY SCHOOLS
1301 Pennsylvania Avenue, N.W., Suite 702
Washington, D.C. 20004
(202) 394-2427

Attorneys for Amicus Curiae

BOTH 405 JZJ

834 b 48

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE PLAIN LANGUAGE OF THE "PREVIOUSLY RECEIVED" PROVISION IS CONSISTENT WITH THE PURPOSE OF IDEA. 4

A. Congress Enacted IDEA To Provide A Free Appropriate *Public* Education To Students With Disabilities. 5

B. The Plain Language Of The Provision In Question Limits Reimbursement To Students Who Previously Received Public Special Education. 7

C. The "Previously Received" Provision Furthers The Goals Of IDEA. 12

D. The Ninth Circuit's Alternative Interpretation Would Lead To Absurd Results That Conflict With Values Firmly Embedded In IDEA. 18

II. TUITION REIMBURSEMENT IMPOSES HIGH COSTS ON SCHOOL DISTRICTS AND DIVERTS RESOURCES AWAY FROM SPECIAL EDUCATION IN PUBLIC SCHOOLS. 21

TABLE OF CONTENTS

Page

A. Tuition Reimbursement Costs To Individual School Districts Are Already High And Would Only Increase If Respondent's Interpretation Is Adopted. 22

B. Tuition Reimbursement In Cases Where Parents Never Intended To Use Public Schools Would Further Drain Resources Needed For Public Special Education. 27

C. Tuition Reimbursement For Expensive Residential Facilities For Troubled Teens Would Exacerbate The Financial Hardship On Public School Districts And Is Unmoored From The Purpose Of IDEA. 30

III. UNDER THE SPENDING CLAUSE, CONGRESS COULD NOT HAVE IMPOSED SUCH A BURDEN WITHOUT PROVIDING CLEAR NOTICE 33

CONCLUSION 36

APPENDIX 1A

TABLE OF AUTHORITIES

Page(s)

CASES

Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,
126 S. Ct. 2455 (2006) 34

Armstrong ex rel Steffensen v. Alicante Sch.,
44 F. Supp. 2d 1087 (E.D. Cal. 1999) 33

Ashland Sch. Dist. v. Parents of Student R.J.,
585 F. Supp. 2d 1208 (D. Or. 2008) 32

Balt. City Bd. of Sch. Comm'rs v. Taylorch,
395 F. Supp. 2d 246 (D. Md. 2005) 14

Bd. of Educ. v. Rowley,
458 U.S. 176 (1982) 25, 34

Burke County Bd. of Educ. v. Denton,
895 F.2d 973 (4th Cir. 1990) 28

C.G. ex rel. A.S. v. Five Town Community Sch. Dist.,
513 F.3d 279 (1st Cir. 2008) 6

Cedar Rapids Cmty. Sch. Dist. v. Garret F.,
526 U.S. 66 (1999) 5

Doe v. Bd. of Educ.,
9 F.3d 455 (6th Cir. 1993) 25

FCC v. NextWave Pers. Comms., Inc.,
537 U.S. 293 (2003) 19

Florence County Sch. Dist. Four v. Carter,
510 U.S. 7 (1993) 8

TABLE OF AUTHORITIES
(continued)

Page(s)

Foley v. Special Sch. Dist.,
153 F.3d 863 (8th Cir. 1998) 9

Frank G. v. Bd. of Educ.,
459 F.3d 356 (2d Cir. 2006) 35

Green v. Bock Laundry Mach. Co.,
490 U.S. 504 (1989) 20

Greenland Sch. Dist. v. Amy N.,
358 F.3d 150 (1st Cir. 2004) 30

Indep. Sch. Dist. No. 283 v. S.D.,
88 F.3d 556 (8th Cir. 1996) 6

Indep. Sch. Dist. No. 284 v. A.C.,
258 F.3d 769 (8th Cir. 2001) 32

Long Island Care at Home, Ltd. v. Coke,
127 S. Ct. 2339 (2007) 20

Lunn v. Weast,
2006 WL 1554895 (D. Md. May 31,
2006) 15

M.M. v. Sch. Bd.,
437 F.3d 1085 (11th Cir. 2006) 28, 29

N.C. ex rel M.C. v. Bedford Cent. Sch. Dist.,
473 F. Supp. 2d 532 (S.D.N.Y. 2007) 32

Pennhurst State Sch. & Hosp. v. Halderman,
451 U.S. 1 (1981) 33

Sch. Comm. of Burlington v. Dep't of Educ.,
471 U.S. 359 (1985) 6, 7, 30

TABLE OF AUTHORITIES
(continued)

Page(s)

Schaffer ex rel. Schaffer v. Weast, -- F.3d --, 2009 WL 205049 (4th Cir. 2009) 20

Schaffer v. Weast, 546 U.S. 49 (2005) 14

United States v. Menasche, 348 U.S. 528 (1955) 19

United States v. Wilson, 503 U.S. 329 (1992) 19

Weast v. Schaffer, 240 F. Supp. 2d 396 (D. Md. 2002) 28

STATUTES

20 U.S.C. § 1411(a)(2) 35

20 U.S.C. § 1412(a)(1)(A) 5

20 U.S.C. § 1412(a)(10)(A)(i)(I) 9

20 U.S.C. § 1412(a)(10)(B) 10

20 U.S.C. § 1412(a)(10)(C)(i) 9, 10

20 U.S.C. § 1412(a)(10)(C)(ii) ..... *passim*

20 U.S.C. § 1412(a)(10)(c)(iii)(III) 14

20 U.S.C. § 1412(a)(10)(C)(iii) 12, 15, 21

20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb) 16

20 U.S.C. § 1412(a)(5) 6

20 U.S.C. § 1415(b)(6) 17

20 U.S.C. § 1415(c)(2)(B)(i)(I) 17

20 U.S.C. § 1415(e)(1) 17

20 U.S.C. § 1415(e)(2)(A)(ii) 17

TABLE OF AUTHORITIES
(continued)

Page(s)

20 U.S.C. § 1415(f)(1)(B)(i)(I) 17

20 U.S.C. § 1415(f)(1)(B)(ii) 16, 17

20 U.S.C. § 1415(i)(2)(C) 18

20 U.S.C. § 1420(a)(10)(C)(iii) 12

REGULATIONS

34 C.F.R. § 300.8(a)(1) 31

34 C.F.R. § 300.8(a)(2)(i) 32

34 C.F.R. § 300.148(d)(3) 14

34 C.F.R. § 300.454(a)(1) 9

34 C.F.R. § 300.508(e) 16

34 C.F.R. § 300.510(c) 16

34 C.F.R. § 300.515(a) 16

LEGISLATIVE MATERIALS

143 Cong. Rec. H2531 (daily ed. May 13, 1997) (entered into record by Rep. William F. Goodling, chairman of the House Education and the Workforce Committee) 13

143 Cong. Rec. H2536 (daily ed. May 13, 1997) (statement of Rep. Michael Castle) 13, 21

143 Cong. Rec. H2537 (daily ed. May 13, 1997) (statement of Rep. Buck McKeon) 13

TABLE OF AUTHORITIES
(continued)

Page(s)

150 Cong. Rec. S5352 (daily ed. May 12, 2004) (statement of Sen. Hutchison) 29

H.R. Rep. 105-95 (1997) 8

S. Rep. No. 105-17 (1997) 8, 11

S. Rep. No. 94-168 (1975) 5, 6, 35

OTHER AUTHORITIES

Richard N. Apling, Congressional Research Service, *Individuals with Disabilities Education Act (IDEA): Current Funding Trends* 9 tbl. 5 (Feb. 2005) 35

Boston Pub. Sch. Tuition Survey 23, 24

Jay G. Chambers, et al., *What are We Spending on Special Education Services in the United States, 1999-2000?* Special Education Expenditure Project 12 (2004) 7, 23

Chicago Public Sch. Tuition Survey 31

Alison Leigh Cowan, *Amid Affluence, a Struggle Over Special Education*, N.Y. Times, April 24, 2005 32

David S. Doty, *A Desperate Grab for Free Rehab: Unilateral Placements Under IDEA For Students With Drug and Alcohol Addictions*, 2004 B.Y.U. Educ. & L.J. 249 (2004) 31

Alyssa Katz, *The Autism Clause*, N.Y. Mag., Oct. 30, 2006 ..... 25, 26, 27

Los Angeles Unified Sch. Dist. Tuition Survey 24, 25, 31

TABLE OF AUTHORITIES
(continued)

Page(s)

Kathy McGabe, *Special-Ed Costs Taxing Town Budgets*, The Boston Globe, April 10, 2008 32

Ylan Q. Mui, *For-Hire Advocates Help Parents Traverse System*, Wash. Post, Oct. 5, 2004 27

New York City Dep't of Educ. Comments on Regulations for the IDEA, 160 PLI/NY 253 (Sept. 2, 2005) 24, 26

New York City Dep't of Education Tuition Survey (2009) 24, 26

New York City Dep't of Education Tuition Survey (2007) 24, 25, 26

Thomas Parrish et al., Center for Special Education Finance, *State Special Education Finance Systems, 1999-2000: Part II: Special Education Revenues and Expenditures* 22 (2004) 22

Cindy L. Skaruppa, et al., *Tuition Reimbursement for Parents' Unilateral Placement of Students in Private Institutions: Justified or Not?*, 114 Educ. L. Rep. 353 (1997) 27, 29

BRIEF OF THE COUNCIL OF THE GREAT CITY SCHOOLS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This brief is submitted on behalf of the Council of the Great City Schools as *amicus curiae* in support of Petitioner.[1]

INTEREST OF *AMICUS CURIAE*

The Council of the Great City Schools ("Council") is a coalition of 67 of the nation's largest urban public school systems.[2] Founded in 1956 and incorporated in 1961, the Council is located in Washington, D.C., where it promotes urban education through legislation, research, media relations, instruction, management, technology, and other special projects. The Council serves as the national voice for urban educators, providing ways to share best practices. For the past decade, the Council's legislative and legal staff has participated extensively in congressional consideration of the Individuals with Disabilities Education Act Amendments of 1997, the Individuals with the Disabilities Education Improvement Act of 2004, and the related regulations promulgated by the United States Department of Education. The

---

[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have filed with the Clerk of the Court a joint letter of consent to briefs of *amicus curiae*.

[2] The Council's membership is set forth in the Appendix.

Council has a vital interest in the outcome of this case as a ruling for Respondent would impose unforeseen burdens on its 67 member school districts and negatively impact the districts' ability to serve all of the children enrolled in their public schools.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Individuals with Disabilities Education Act ("IDEA") to provide a free appropriate *public* education to students with disabilities. Although reimbursement of private school tuition is sometimes available under IDEA, such expenditures detract from the statute's preference for public education and divert taxpayer dollars away from public school students and programs. Well aware that school district budgets are limited and that public money for special education must be spent wisely so that the needs of all students with disabilities can be met appropriately, Congress subjected private school tuition reimbursement under IDEA to careful limitations.

The statutory provision at issue in this case – 20 U.S.C. § 1412(a)(10)(C)(ii) – is one of those limitations. Students to whom a free appropriate public education ("FAPE") has not been made available, and who have been unilaterally placed in private school by their parents, are permitted to seek tuition reimbursement if, *but only if*, they have "previously received special education and related services under the authority of a public agency." 20 U.S.C. § 1412(a)(10)(C)(ii).

This reading of the provision is compelled by the plain language of the statute. It also is the only

reading consistent with the goals of IDEA. First, as the legislative history demonstrates, the provision was fashioned in direct response to the growing problem of improper diversion of public resources to private schools. Second, the provision screens from the system parents who never intend to enroll their children in public school in the first place, and seek only public subsidization of their preferred private school. And third, the provision advances Congress's preference for public education by providing school districts with the opportunity to implement an appropriate public educational program before becoming responsible for funding a costly private school alternative.

Respondent's contrary interpretation cannot be squared with the statutory text, and would render it superfluous. It also would lead to results completely inconsistent with IDEA. Congress and this Court have both made clear that IDEA gives precedence to public schools as the preferred setting for the fulfillment of the statute's mandates. Yet under Respondent's interpretation of the provision, students who have previously received public special education and related services are treated less favorably than those who have not – an outcome at odds with the statute's goals.

School districts face increasingly high costs resulting from private school tuition reimbursement claims. These costs are exacerbated by a new generation of reimbursement claims – claims, like the instant one, involving expensive private residential facilities for students with behavioral and drug-related problems. Permitting unrestricted reim-

bursement of private school tuition will seriously deplete public education funds and directly impact services to the millions of students with disabilities who do receive the public special education and related services that are the cornerstone of IDEA.

Finally, Spending Clause legislation (such as IDEA) must provide clear notice of the financial burdens it imposes upon the state entities accepting federal funds. The provision here clearly and expressly *declines* to impose on state school districts the financial obligations sought by Respondent. But even if the statute could somehow be deemed ambiguous on the point, that would not be enough under the Spending Clause. There is no plausible reading of the statute that would put districts on unambiguous notice of a duty to fund unilateral private-school placements for students who have not "previously received" public services. Construing this provision to permit tuition reimbursement under such circumstances would force school districts to assume costly burdens they could not have foreseen when they accepted federal funds – a result unacceptable under the Spending Clause.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE "PREVIOUSLY RECEIVED" PROVISION IS CONSISTENT WITH THE PURPOSE OF IDEA.

Congress clearly and directly answered the precise question that is before the Court. Section 1412(a)(10)(C)(ii) of the IDEA directs that a student who has been unilaterally placed by his parents in a

private school may bring a claim for private tuition reimbursement only if that student has "previously received special education and related services under the authority of a public agency." 20 U.S.C. § 1412(a)(10)(C)(ii). This provision furthers the goals of IDEA by maintaining the baseline preference for the education of children with disabilities in *public* schools, while allowing for private tuition reimbursement in limited circumstances.

A. Congress Enacted IDEA To Provide A Free Appropriate *Public* Education To Students With Disabilities.

The cornerstone of IDEA is its guarantee of a "free appropriate *public* education" for "all children with disabilities." *Id.* § 1412 (a)(1)(A) (emphasis added). Congress first made that commitment over thirty years ago in the Education for All Handicapped Children Act of 1975 ("EHA"), the predecessor to IDEA. That statute was passed in response to a growing realization that American children with disabilities were being substantially underserved by their public school systems due to the increasing costs of special education. *See* S. Rep. No. 94-168, at 8 (1975). Acutely aware of the limited local resources available to meet this growing need, Congress acknowledged the "necessity of an expanded Federal fiscal role," *id.* at 5, and promised the much-needed funds to States that complied with the Act's mandate to provide a FAPE to all students with disabilities, *id.* at 2, 13.

Congress's decision to focus federal resources on the guarantee of a *public* education was intentional and meaningful. *See, e.g., Cedar Rapids Cmty. Sch.*

Dist. v. Garret F., 526 U.S. 66, 78 (1999) (in enacting the statute, "Congress intended to open the doors of *public* education to all qualified children") (emphasis added). Before the EHA, students with disabilities were often relegated to private institutions, a reality Congress specifically sought to change with this legislation. *See* S. Rep. No. 94-168, at 9 (recognizing that "[p]roviding educational services will ensure against persons needlessly being forced into institutional settings" and save "billions of dollars" expended on such placements).

By favoring public (as opposed to private) education of children with disabilities, Congress served twin goals: not only did it encourage a better learning environment for the students, but it did so in a manner that was more cost effective for the community. *Id.* Because public schools are open to everyone in a community, they are more likely than private schools to offer opportunities for mainstreaming students with disabilities in the least restrictive environment – a goal made explicit by Congress in the text of the statute. *See* 20 U.S.C. § 1412(a)(5); *see also C.G. ex rel. A.S. v. Five Town Community Sch. Dist.*, 513 F.3d 279, 285 (1st Cir. 2008) ("It is common ground that the IDEA manifests a preference for mainstreaming disabled children."); *Indep. Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556, 561 (8th Cir. 1996) (IDEA's "strong preference" that students with disabilities be educated in their least restrictive environment "gives rise to a presumption in favor of . . . placement in the public schools").

Moreover, private school tuition for special education students far exceeds the typical public school

per pupil cost. *See, e.g.*, Jay G. Chambers, et al., *What are We Spending on Special Education Services in the United States, 1999-2000?* Special Education Expenditure Project 12 (2004) (showing that annual per-pupil special education expenditure for school-aged programs operated within public schools is $5,709 compared to $26,440 for school-aged programs operated outside public schools, a figure that includes tuition).[3] Congress's decision to make public schools the front line in the effort to provide FAPE to all children with disabilities was not only wise educational policy, but also fiscally sound. Section 1412(a)(10)(C)(ii)'s restrictions on payments for private school tuition serve both those objectives.

B. The Plain Language Of The Provision In Question Limits Reimbursement To Students Who Previously Received Public Special Education.

1. Because IDEA emphasizes public education, the original version of the Act did not explicitly address reimbursement for private school tuition in cases where the parents elect private school without the public school's consent. With little statutory text to guide it, this Court ultimately concluded that parents *could*, at least in some instances, be reimbursed for private school tuition even when the public agency does not consent to the arrangement. *See Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S.

---

[3] While this 2004 study compiling data from the 1999-2000 school represents the most recent formal study available, costs have only continued to rise. *See* Part II, *infra*.

359, 369 (1985). In the absence of any specific statutory provision, the *Burlington* Court grounded its holding in the broad remedial powers IDEA generally vests in the courts. *See id.*; *see also Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 12 (1993).

In response to *Burlington* and its progeny, Congress amended IDEA in 1997 to clarify the parameters of tuition reimbursement.[4] And it did so with a keen awareness of the financial constraints under which public schools operate. The 1997 amendments, including the provision at issue here, are part of a comprehensive framework that balances the possibility of private school tuition reimbursement with the IDEA's core commitment to public education of students with disabilities.

2. The IDEA provision at issue here is best understood when considered in its full context. At its most general, the 1997 package of amendments reaffirms that tuition reimbursement is disfavored and generally not required under IDEA:

> [This subchapter] does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education

---

[4] Congress enacted the 1997 amendments in response to a number of cases that arose out of IDEA's lack of specificity regarding the scope of public schools' obligation to reimburse private school tuition, including *Burlington* and *Carter* and various decisions of the courts of appeals. *See generally* S. Rep. No. 105-17, at 13 (1997); H.R. Rep. 105-95, at 92-93 (1997).

> available to the child and the parents elected to place the child in such private school or facility.

20 U.S.C. § 1412(a)(10)(C)(i). At the same time, against this baseline expectation that services would be provided in public schools, Congress identified three limited circumstances in which public funding for services in private schools or private school tuition reimbursement may be appropriate.

First, when parents unilaterally choose private school,[5] the student may receive services under the "proportionate share" provision, which states that amounts expended on special education and related services by a local educational agency ("LEA") for private school students "shall be equal to a proportionate amount of Federal funds made available under this part." *Id.* § 1412(a)(10)(A)(i)(I). This provision does not create an individual entitlement to any services from the LEA. 34 C.F.R. § 300.454(a)(1). Rather, it "expressly provide[s] that public school agencies are not required to pay the costs of special education services for a particular child; States are required only to spend proportionate amounts on special education services for this class of students as a whole." *Foley*, 153 F.3d at 865.

---

[5] Students may become eligible for services pursuant to the "proportionate share" provision in a variety of ways, including when FAPE has been made available, often because parents choose to send their children to religious schools. *See, e.g.*, *Foley v. Special Sch. Dist.*, 153 F.3d 863, 864 (8th Cir. 1998) (parents seeking services under proportionate share provision stipulated that student had been offered FAPE at public elementary school but had been voluntarily placed in parochial school).

Second, when the public agency and parents agree that the school district is unable to provide FAPE for the student, the school district will refer the student to private school (or another public school district) at no cost to the parents. 20 U.S.C. § 1412(a)(10)(B). This provision is the operative one in cases where there is an *agreement* by the public school districts that a private school or institution is the appropriate placement, as opposed to cases in which parents choose to send the student to private school "without consent of . . . the public agency." *Compare id.* 20 U.S.C §§ 1412(a)(10)(C)(i), (ii).

Third, and finally, Congress added the provision implicated in this case, which provides that students who are unilaterally placed in private school by their parents (*i.e.*, without agreement by the school district that private school is the appropriate placement) *may* be eligible for tuition reimbursement only if certain criteria are met. Specifically:

> If the parents of a child with a disability, *who previously received special education and related services under the authority of a public agency*, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

Id. § 1412(a)(10)(C)(ii) (emphasis added).

Notably, this provision is broadly entitled "Payment for education of children enrolled in private school without consent of or referral by the public agency." *Id.* This general heading indicates that Congress meant to cover the whole landscape of private school tuition claims in unilateral placement cases, rather than just a sub-group of those claims – i.e., those who have previously received relevant services, as Respondent submits, *see* Resp.'s Br. in Opp'n at 23-24. The plain language of the section limits reimbursement only to students who have previously received special education services under the authority of a public agency.

Congress was even stricter in setting conditions for private tuition reimbursement. Even students who have previously received public special education and related services may be denied tuition reimbursement, in whole or in part, if the parents (1) fail to inform the student's Individualized Education Program ("IEP") team that they are rejecting the proposed placement, (2) did not give written notice to the public agency ten days prior to removing the student from public school, (3) did not make the student available for an evaluation, or (4) otherwise acted unreasonably (*i.e.*, "upon a judicial finding of unreasonableness with respect to actions taken by the parents"). 20 U.S.C. § 1412(a)(10)(C)(iii).[6]

---

[6] The legislative history of this provision confirms the plain language. Congress emphasized that it was adding the new requirement that "[p]reviously, the child must have received special education and related services under the authority of a public agency." S. Rep. No. 105-17, at 13.

Once this "previously received" prerequisite is met, the amendments preserve courts' discretion to determine whether tuition reimbursement is proper under the familiar balancing test used by this Court in *Burlington* and *Carter*. *Id.* § 1412(a)(10)(C)(ii) (stating that courts or hearing officers "*may* require" reimbursement if a student who previously received services in public school has been unilaterally placed in private school) (emphasis added). In cases where a student "previously received" public special education and related services, courts must still determine whether FAPE has been provided, *see id.*, and whether parents have acted reasonably in unilaterally placing the student in private school, *id* § 1420(a)(10)(C)(iii). But in no case may a district be required to reimburse the cost of private school tuition under § 1412 (a)(10)(C)(ii) if the student has not "previously received" public services.

C. The "Previously Received" Provision Furthers The Goals Of IDEA.

Giving the words carefully chosen by Congress their plain meaning and effect does not, as Respondent argues, lead to an absurd result. On the contrary: reading § 1412(a)(10)(C)(ii) according to its text serves three functions that further the central goals of IDEA.

1. First, the legislative history of the 1997 amendments as a whole, and of the "previously received" provision in particular, demonstrate Congress's intent to reduce school districts' costs under IDEA. As Representative Michael Castle explained when the amendment was passed: "This bill makes it harder for parents to unilaterally place a child in

elite private schools at public taxpayer expense, lowering costs to local school districts." 143 Cong. Rec. H2536 (daily ed. May 13, 1997) (statement of Rep. Michael Castle). *See also* 143 Cong. Rec. H2537 (daily ed. May 13, 1997) (statement of Rep. Buck McKeon) (observing that the 1997 amendments "provide more dollars to the classroom, reduce the costs of litigation, and reduce paperwork and process costs").

Indeed, the 1997 amendments were both sought and welcomed by the public schools as a necessary cost-saving measure. One national education organization wrote Congress in support of the legislation, explaining that "[s]everal costly requirements have been removed or modified from current law, such as relief in the area of attorneys fees and reimbursement of unilateral placements by parents." 143 Cong. Rec. H2531 (daily ed. May 13, 1997) (entered into record by Rep. William F. Goodling, chairman of the House Education and the Workforce Committee).

Costs to school districts for private school tuition reimbursements resulting from unilateral placements are already high. If the decision of the court of appeals is not reversed, these costs may quickly become exorbitant for school districts nationwide – a result directly at odds with the purpose behind the 1997 amendments.

2. The provision in question also screens out reimbursement claims from parents who never intend to enroll their children in public school, regardless of the special education services made available. As they are presumed to do, school districts carry out their responsibilities under IDEA in good faith. *See*

Schaffer v. Weast, 546 U.S. 49, 62-63 (2005) (Stevens, J., concurring) ("I believe that we should presume that public school officials are properly performing their difficult responsibilities under this important statute."). The unfortunate reality, however, is that public school districts are frequently saddled with tuition reimbursement in cases where it is evident that the student's parents did not enter the IEP process in good faith and never intended to send their child to a public school. *See* Part II.B, *infra*.

The "previously received" provision mandates that, before they may unilaterally remove their children from public school at a district's expense, parents demonstrate that they are acting in good faith by giving public schools a meaningful opportunity to provide FAPE. The requirement that parents act in good faith and provide schools with this opportunity is further reinforced by § 1412(a)(10)(C)(iii)(III), which provides that even if a student is eligible for private school tuition reimbursement under § 1412(a)(10)(C)(ii), reimbursement may still be reduced or denied "upon a judicial finding of unreasonableness with respect to actions taken by the parents." 20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R. § 300.148(d)(3).

These requirements protect the public fisc and prevent abuse by parents who never intended to use the public schools. *See, e.g.*, *Balt. City Bd. of Sch. Comm'rs v. Taylorch*, 395 F. Supp. 2d 246, 250 (D. Md. 2005) ("Congress has clearly spoken, and, in order to prevent the FAPE process from being converted to a program for funding private tuition for parents who have demonstrated no commitment to

the public school system, it has imposed as a condition for reimbursement the child's initial enrollment in a public school.").

3. Finally, requiring prior receipt of public special education services is consistent with the IDEA goal of promoting public education. A school district must be given an opportunity to implement an appropriate program itself before it is required to fund a private school alternative. And that opportunity is made meaningful only if a program is given a chance to work in practice, while a student attends public school.

Creating a successful IEP for a student with a disability is an evolving process. Everyone, including the hearing officers and courts asked to adjudicate disputes regarding the efficacy of the placement, benefits from the opportunity to assess the placement in practice, rather than on paper. And common sense dictates that if IEPs are given time and opportunity to work (and adjusted, if necessary), disputes over reimbursement between parents and school districts will be reduced. *See Lunn v. Weast*, 2006 WL 1554895, at *7 (D. Md. May 31, 2006) ("The intent is that prior to placing a child in private school, parents must give the public school system an opportunity to provide a FAPE to the child and, where the parent disagrees with the type or level of services provided, to revisit the plan and make adaptations where necessary.").

Compliance with the "previously received" provision is not onerous and would require public school placement for only the relatively short period of time necessary to assess the adequacy of the plan in prac-

tice.[7] As this Court has concluded, when the preferred public school placement can be resolved within a relatively brief period of time, a short delay in achieving an appropriate IEP in the public setting is both tolerable and preferable to private school tuition reimbursement. *Cf. Burlington*, 471 U.S. at 370 (stating that "[i]f the administrative and judicial review under the Act could be completed in a matter of weeks, rather than years, it would be difficult to imagine a case in which" ordering a public school to develop a new IEP would not be preferable to placement in private school).

---

[7] While the statute provides only that the parents must act "reasonably" and does not set forth an express time limit for how long a student must have been enrolled to qualify for tuition reimbursement, other sections of the statute and its implementing regulations provide textual guidelines to aid lower courts in explicating those parameters. *See, e.g.*, 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb) (parents must give public agency 10 days' written notice that they are rejecting the proposed placement and "to enroll their child in a private school at public expense"); 34 C.F.R. § 300.508(e) (if parents bring a due process claim against the school district requesting reimbursement, the LEA must respond within 10 days of receipt of the complaint); 20 U.S.C. § 1415(f)(1)(B)(i)) (after a complaint is filed, a resolution meeting between the parents and members of the students' IEP team must be held within 15 days); *id.* § 1415(f)(1)(B)(ii) (LEA must resolve complaint within 30 days of receipt); 34 C.F.R. §§ 300.510(c), 300.515(a) (if complaint is not resolved, the due process timeline begins and a decision must be reached within the ensuing 45 days). Should a dispute arise over this issue in any given case, the lower courts may look to these timing and procedural provisions to help them determine whether a student has a legitimate claim that he or she has "previously received" special education services.

Moreover, Congress provided several statutory mechanisms through which parents can attempt to resolve any concerns about the program offered by the public school short of the drastic step of removing their child from the public school system before it has had a chance to provide services. The statute guarantees parents "an opportunity . . . to present a complaint with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of [FAPE] to such child." 20 U.S.C. § 1415(b)(6). It then provides for a speedy evaluation of their claim – including a right to a preliminary meeting with the school district within 15 days of receiving notice of the parents' complaint, and a due process hearing before a neutral hearing officer within 30 days. *See id.* § 1415(f)(1)(B)(i)(I); *id.* § 1415(f)(1)(B)(ii); *see also id.* § 1415(c)(2)(B)(i)(I) (requiring a response from the local educational agency to the parents' complaint within 10 days); *id.* § 1415(e)(2)(A)(ii) (mandating that the dispute resolution procedures not be used "to deny or delay a parent's right to a due process hearing").[8]

For all of these reasons, compliance with the "previously received" requirement of § 1412(a)(10)(C)(ii) does not leave parents without options when they believe a proposed placement is inappropriate for their child. Far from leading to absurd results as the Court of Appeals concluded, *see Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078, 1087 (9th Cir. 2008), section 1412(a)(10) represents a rea-

---

[8] Before such a formal "due process hearing" takes place, IDEA also provides parents with a voluntary mediation option that is funded by the state. 20 U.S.C. § 1415(e)(1).

sonable, holistic approach to the provision of special education services in private schools under IDEA, and the "previously received" provision merely ensures that school districts are first given an opportunity to provide those services themselves.[9]

D. The Ninth Circuit's Alternative Interpretation Would Lead To Absurd Results That Conflict With Values Firmly Embedded In IDEA.

The court below rejected the plain import of the "previously received" provision, holding that § 1412 (a)(10)(C)(ii) governs only those tuition reimbursement claims made by the sub-group of students who have "previously received special education." *See Forest Grove*, 523 F.3d at 1087; *see also* Resp.'s Br. in Opp'n at 13. Claims for reimbursement from all other students, the court concluded, are covered by a different section of the statute, the general remedial provision authorizing the award of "appropriate relief" under equitable principles, *see* 20 U.S.C. § 1415(i)(2)(C). That tortured interpretation is not only inconsistent with the text of the "previously re-

---

[9] Respondent argues that the school district's interpretation leads to absurd results because it would allow students to be denied special education in a public school and then denied reimbursement under § 1412. *See* Resp.'s Br. in Opp'n at 26. That argument misunderstands the statutory structure of IDEA. If a child is determined ineligible for special education services in a public school, the parents' recourse is to challenge that decision; and, as described above, the statute provides many procedural safeguards to assure an evaluation of their claim within weeks. In this case, Respondent's mother agreed with the initial ineligibility determination. *Forest Grove*, 523 F.3d at 1081.

ceived" provision, but also would badly undermine the purpose of Congress's 1997 amendments.

1. As an initial matter, Respondent's construction violates one of this Court's primary interpretive rules: that meaningful effect must be given, where possible, "to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *see FCC v. NextWave Pers. Comms., Inc.*, 537 U.S. 293, 307 (2003) (rejecting statutory interpretation that not only "distort[ed] the text of the provision" but "render[ed] the provision superfluous"). If Respondent's understanding of the statute is correct, then the "previously received" language in § 1412 is meaningless – a result that must be avoided whenever possible.

A similar and familiar maxim is that "when Congress alters the words of a statute, it must intend to change the statute's meaning." *United States v. Wilson*, 503 U.S. 329, 336 (1992). As even the Court of Appeals acknowledged, however, *see Forest Grove*, 523 F.3d at 1087, under Respondent's interpretation, a student unilaterally placed in private school without previously receiving public education services would be treated no differently after the 1997 amendments than before – rendering meaningless the more recent directive. Congress's later mandate on tuition reimbursement should take precedence over its earlier authorization of general equitable relief.

Indeed, the "previously received" provision is not only more recent than § 1415's remedial clause, but also more specific. Only the "previously received" provision specifically and explicitly addresses private

school tuition reimbursement. In fact, it is introduced by a heading that reads "Reimbursement for private school placement." 20 U.S.C. § 1412(a)(10)(C)(ii). By contrast, the clause Respondent relies on is the grant of general remedial power to the district court in IDEA cases. *Id.* § 1415(i)(2)(C)(iii) (the district court "shall grant such relief as the court determines is appropriate"). As this Court recently explained, "normally the specific governs the general." *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2348 (2007); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524 (1989) ("A general statutory rule usually does not govern unless there is no more specific rule."). It follows that here, § 1412's more recent directive, specific to private tuition reimbursement, trumps § 1415's earlier and broader remedial provision.

2. Finally, Respondent's interpretation of the "previously received" provision would have precisely the opposite effect from the one intended by Congress. As established above, the cornerstone of IDEA is providing appropriate *public* education for children with disabilities. *Schaffer ex rel. Schaffer v. Weast*, -- F.3d --, 2009 WL 205049 (4th Cir. 2009) ("[T]he IDEA's purpose [is to] include[e] disabled students in the *public* education system as quickly as possible.") (emphasis added). Respondent's interpretation of the "previously received" provision defeats this purpose in two important ways.

First, on Respondent's reading, because § 1412(a)(10)(C)(ii) of IDEA governs claims *only* from those students who have previously received public education, *only* those students are subject to the

other restrictions that accompany that section. *See* 20 U.S.C. § 1412(a)(10)(C)(iii). But that would allow parents who have never attempted to address their child's special education needs in public schools to bypass the specific restrictions on reimbursement in § 1412(a)(10)(C), while imposing those restrictions on parents who have given their public school districts a meaningful opportunity to meet their children's needs. Given the objectives of IDEA, Congress could not have intended that counterproductive result.

Second, as shown in the next part, adopting Respondent's interpretation would significantly increase the costs to school districts for private school tuition reimbursement. The 1997 IDEA amendments, however, were specifically designed to have the opposite effect. *See* 143 Cong. Rec. H2536 (daily ed. May 13, 1997) (statement of Rep. Michael Castle) ("This bill makes it harder for parents to unilaterally place a child in elite private schools at public taxpayer expense, lowering costs to local school districts."). The court below erred in rejecting the plain meaning of the "previously received" provision in favor of an atextual reading that is manifestly inconsistent with this congressional purpose.

II. TUITION REIMBURSEMENT IMPOSES HIGH COSTS ON SCHOOL DISTRICTS AND DIVERTS RESOURCES AWAY FROM SPECIAL EDUCATION IN PUBLIC SCHOOLS.

Public schools have diligently undertaken the great responsibilities with which they have been entrusted by IDEA. For decades, they have endeav-

ored to fulfill their statutory mandate to provide FAPE to students with disabilities.

Most public school systems, however, must operate within significant budget constraints. IDEA imposes great costs on these school districts, and private school tuition reimbursement claims by students who have never been "previously enrolled" in public school special education programs would dramatically increase these already-high and often unpredictable costs. Such claims divert resources from their intended and best use: providing IDEA services to public school students who need and want to receive them.

A. Tuition Reimbursement Costs To Individual School Districts Are Already High And Would Only Increase If Respondent's Interpretation Is Adopted.

In one recent school year, public schools spent over 20% of their general operating budgets on special education students. Thomas Parrish et al., Center for Special Education Finance, *State Special Education Finance Systems, 1999-2000: Part II: Special Education Revenues and Expenditures* 22 (2004).[10] A significant portion of these costs is at-

---

[10] The total spent to educate all special education students (both pre-school and school-aged) was over $78 billion. Parrish, *supra*, at 22. Of this, schools spent approximately $50 billion on special education services, $27.2 billion on regular education services for students with disabilities, and $1 billion on other special needs programs for students with disabilities. *Id.* Approximately $36 billion of the $50 billion spent on special edu-

tributable to expenditures for services outside the public schools, including tuition reimbursement. During that same school year, for example, $5.3 billion of the $36 billion spent on special education services for school-aged students funded "students placed in non-public school programs or programs operated by public agencies or institutions other than the public school district . . . includ[ing] tuition" and other expenses. Chambers, *supra*, at 10.

Even more striking is the contrast between the costs associated with public and private special education programs. The average expenditure per school-aged student in public school special education programs was $5,709, while the average special education expenditure per school-aged student in programs operated outside the public schools was $26,440 – nearly five times as much. *See id.* at 12; *see also* Boston Pub. Sch. Tuition Survey (average fiscal year 2007 per-pupil expenditure on special education in public schools was approximately $13,000, while the average per-pupil expenditure on private special education was $59,553).[11]

While the financial impact of private school tuition reimbursement is overwhelming for public school districts in the aggregate, the costs to individual districts of funding special education in private school is even more dramatic. For example, since the 2004 school year, New York City has spent

---

cation services was spent on school-aged children. Chambers, *supra*, at 10.

[11] All school district tuition surveys cited herein are on file with the Council of the Great City Schools.

over $237 million in tuition reimbursement and over $7 million in legal fees. New York City Dep't of Education Tuition Survey (2009). A staggering 4,368 (78% percent) of those cases involved unilateral placements and in over half the child had not previously received special education services from the public school system. *Id.* Costs are similarly high in other urban districts. *See, e.g.*, Los Angeles Unified Sch. Dist. Tuition Survey (total tuition and related services expenditures of over $3 million in 2006-2007, and $2.8 million in 2007-2008).

School district data shows that tuition reimbursement costs are even higher in cases involving students who have been unilaterally placed in private schools by their parents. In New York City, "[t]he cost of claims for unilateral placements in private schools is estimated at over forty million dollars per year." New York City Dep't of Educ. Comments on Regulations for the IDEA, 160 PLI/NY 253, 256 (Sept. 2, 2005) ("New York Comments"); *see also* New York City Dep't of Education Tuition Survey (2009) (total spent on unilateral placement cases was over $53 million in 2005-2006, over $57 million in 2006-2007, and over $85 million for 2007-2008). In the last three academic years, the average settlement per-pupil paid by New York City in unilateral placement cases was $13,716.78 (2005-2006), $23,018 (2006-2007), and $22,534.78 (2007-2008). *Id.*; *see also* New York City Dep't of Education Tuition Survey (2007). In Boston, the tuition reimbursement settlement in such cases was similarly high – 38 cases totaling $707,183.48 (with an average of $18,600 each) in the 2006-2007 school year alone. *See* Boston Pub. Schs. Tuition Survey. *See*

also Los Angeles Unified Sch. Dist. Tuition Survey (average claim for tuition reimbursement and services was $17,774 in 2006-2007 and $16,294 in 2007-2008).

These costs will only continue to rise as the cost of private school tuition steadily increases. Costs will rise even more dramatically if the Court of Appeals' interpretation is adopted, and as the number of for-profit schools providing special education increases. One such school in New York City that provides various types of therapy to developmentally disabled students "enrolls more than 300 and collects $21,821 per student from the city each year," and more and more schools like this are opening. Alyssa Katz, *The Autism Clause*, N.Y. Mag., Oct. 30, 2006 at 52 (discussing the recent opening of several such schools in New York, including one with annual tuition of $26,500, an autism-focused school with annual tuition of $72,500, and another autism-focused school[12] that charges $84,000 per year). Indeed, a student in one of these schools brought a reimbursement claim for the 2004-2005 school year seeking more than $230,700 in tuition and related services. *See* New York City Dep't of Educ. Tuition

---

[12] This school's program has been described as the "gold standard." Katz, *supra*, at 132. Students at this school routinely receive public funding for their tuition, id., despite the fact that IDEA guarantees only an appropriate education, not the best education possible, *see Bd. of Educ. v. Rowley*, 458 U.S. 176, 197 (1982) (IDEA does not require schools to provide a "potential-maximizing education"); *Doe v. Bd. of Educ.*, 9 F.3d 455, 459-60 (6th Cir. 1993) (IDEA requires only that the district provide "the educational equivalent of a serviceable Chevrolet," not a "Cadillac").

Survey (2007). The founder of some of these schools has stated that he fully expects all parents who enroll their children in his schools to sue the City for tuition reimbursement. *See* Katz, supra, at 52.

The New York City model is unique in that over half of its due process hearing requests involve tuition reimbursement for private unilateral placements, *see* New York Comments, *supra*, at 256, and in almost half of those cases (2,184), the child has never attended public school, *see* New York City Dep't of Educ. Tuition Survey (2007) (data from 2005-2006 school year). Yet this model could well become the rule rather than the exception if the Court of Appeals' interpretation becomes the law of the land. Even if school districts could theoretically win many or most such lawsuits by showing that they could have provided FAPE, the administrative, litigation, and potential settlement costs of these cases are staggering.[13]

---

[13] As the New York City experience demonstrates, districts will often agree to settle these cases and pay tuition or some portion of it rather than face litigation. In both the 2006-2007 and 2007-2008 academic years, New York City settled approximately 85% of the requests it received for impartial hearings in unilateral placement cases. *See* New York City Dep't of Educ. Tuition Survey (2009). Average settlement costs in those years were $23,018.84 and $22,534.78, respectively. *Id.* These settlements are most often unrelated to the relative merits of any given case. Rather, they reflect the fact that settlement is often preferable to incurring high litigation costs and is often the only option given that the City has very limited special education attorneys to handle the thousands of impartial hearing requests made in unilateral placement cases each year. *Id.* (showing that New York City received approximately 3,688

B. Tuition Reimbursement In Cases Where Parents Never Intended To Use Public Schools Would Further Drain Resources Needed For Public Special Education.

IDEA was intended to provide public special education, not to use taxpayer money to fund private education. *See* Part I.A, *supra*. Nevertheless, many parents ask public school districts to develop an IEP for their child even when they intend from the outset to reject whatever IEP is developed and unilaterally place their child in their preferred private school, requesting reimbursement under IDEA in the hopes of what amounts to a publicly-financed windfall.[14] *See generally* Cindy L. Skaruppa, et al., *Tuition Reimbursement for Parents' Unilateral Placement of Students in Private Institutions: Justified or Not?*, 114 Educ. L. Rep. 353 (1997).

Of course, such bad faith behavior cannot be attributed to all parents seeking reimbursement under

---

such requests in 2006-2007 and approximately 4,368 in 2007-2008).

[14] Parents are often prompted to make these requests by those with a financial interest in private-school placements. Some private schools routinely distribute to all prospective parents a folder titled "Reimbursement for Placement Made By Parents in a Private School" that lists "contact information for five lawyers and basic instructions on how to sue the city of New York." Katz, *supra*, at 52. Private education consultants hired by parents to navigate the special education process also often steer their clients to private schools for which reimbursement is then sought. *See generally* Ylan Q. Mui, *For-Hire Advocates Help Parents Traverse System*, Wash. Post, Oct. 5, 2004, at A17.

IDEA. But even the litigated cases reflect the unfortunate reality that parents who try to game the system are commonplace. *See, e.g.*, *M.M. v. Sch. Bd.*, 437 F.3d 1085, 1090-93 (11th Cir. 2006) (parents participated in IEP process but made clear from the outset that they wanted to continue their child's current private school placement and wanted a particular form of therapy the district did not provide, then proceeded to reject the district's IEP – offering a different but established therapy – and to request reimbursement); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 976 (4th Cir. 1990) (parents presented district with a fully formulated plan of services for their autistic son before even requesting an IEP, rejected the district's proposed IEP, and sought reimbursement when the district agreed to fund only part of the requested plan); *Weast v. Schaffer*, 240 F. Supp. 2d 396, 401 (D. Md. 2002) (observing that ALJ had found "that there was a design by the parents to simply obtain funding from [the public school] for a predetermined decision to have the Child attend private school"), *rev'd on other grounds by* 377 F.3d 449 (4th Cir. 2004), *aff'd Schaffer*, 546 U.S. 49 (2005); *Lunn*, 2006 WL 1554895, at *3-4 (parent did not request an IEP until after she had paid a substantial tuition deposit and signed an enrollment contract obligating her to pay over $36,000 even if her child withdrew at any point before or during the school year).

This diversion of public resources toward payment of private school tuition directly impacts educational outcomes for students who receive special education services in public schools. Every dollar spent on tuition reimbursement is a dollar that can-

not be spent to improve public special education programs.[15] *See* Skaruppa, *supra*, at 357 (observing that funds spent on reimbursement in unilateral placement cases "could be more efficiently and effectively used within the public school setting to educate a greater number of students"). It disproportionately impacts students with the greatest need for public services, namely those whose families cannot afford to seek services outside the public school system.[16] This Court acknowledged that socio-economic

---

[15] An example from the attorneys' fees context starkly illustrates the positive educational impact of returning previously diverted resources to public school special education programs. When the attorneys' fee cap in IDEA cases was reinstituted in the District of Columbia in fiscal year 2003, public schools saved $4.4 million. 150 Cong. Rec. S5352 (daily ed. May 12, 2004) (statement of Sen. Hutchison). ("Based on those savings, DCPS was able to create 550 new classroom seats at 50 schools during the 2003-2004 school year to serve children with special needs, including children with autism, children who are hearing or vision impaired, mentally retarded, learning disabled or emotionally disabled, and early childhood education students.").

[16] Private school tuition reimbursement is typically sought by parents who are familiar with the intricacies of IDEA and who have the resources to pay private school tuition out-of-pocket while they are seeking reimbursement. *See* Skaruppa, *supra*, at 354 ("Students of low SES [socio-economic status] parents often do not have the same consideration as their higher SES peers because low income parents do not have the available capital to pay for their child's placement, particularly when they are unaware or uncertain of reimbursement."); Mui, *supra*, at A17 (observing that parents "often spend considerable amounts of money" in hiring educational consultants to navigate special education rules and place students in "therapeutic schools," and that the average family income of one educational consulting firm's clients "is about $75,000 per year"); *see also, e.g.*, *M.M.*, 437 F.3d at 1090 n.3 (noting that student's mother

reality in *Burlington*, noting that "parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so *at their own financial risk*." 471 U.S. at 373-74 (emphasis added). Adoption of the Court of Appeals' interpretation would only exacerbate this problem, increasing the number of reimbursement cases and thereby diverting still more public resources to private schools – all to the detriment of public school programs, the students and parents who lack the resources to pay for private school, and those who give the public school programs a good-faith chance to succeed.

C. Tuition Reimbursement For Expensive Residential Facilities For Troubled Teens Would Exacerbate The Financial Hardship On Public School Districts And Is Unmoored From The Purpose Of IDEA.

Finally, as the facts of this case suggest, the financial strains imposed on school districts by Respondent's reading of the statute are likely to worsen, not improve, in the future. That result cannot be reconciled with Congress's clear intent to ameliorate the financial burdens imposed by private-school reimbursements under IDEA.

Respondent T.A. was privately diagnosed with attention deficit hyperactivity disorder, depression, math disorder, and substance abuse. *See Forest*

---

taught at the private school she attended); *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 152 (1st Cir. 2004) (student's mother was a special education teacher).

Grove, 523 F.3d at 1082. To address all of these problems, his parents enrolled him in Mount Bachelor Academy, an expensive residential private school which describes itself as "designed for children who may have academic, behavioral, emotional, or motivational problems." *Id.*

Schools like Mount Bachelor are the next generation of special education for "troubled teens." *See generally* David S. Doty, *A Desperate Grab for Free Rehab: Unilateral Placements Under IDEA For Students With Drug and Alcohol Addictions*, 2004 B.Y.U. Educ. & L.J. 249 (2004). Because many students who use illicit drugs also show emotional disturbances and deficits in school performance, it is common for parents to seek help from an institution specifically designed to address those multi-faceted needs. *See* Los Angeles Unified Sch. Dist. Tuition Survey (noting over 80% of requests for residential programs in Los Angeles include a substance abuse component); Chicago Public Sch. Tuition Survey (citing an enormous increase in court and agency student placement in drug rehabilitative programs due to changes in state law, increasing their expenses by over $1 million in fiscal year 2008).

The problem for IDEA reimbursement purposes, however, lies in determining when placements in such residential schools is needed for educational purposes, and when it is necessitated by medical or social problems. A student with an "emotional disturbance" qualifies as a child with a disability under IDEA. 34 C.F.R. § 300.8(a)(1). But when a child's "emotional disturbance" is accompanied by a drug addiction or other troubled behavior, courts across

the country have struggled with disentangling the two.[17] *Compare N.C. ex rel M.C. v. Bedford Cent. Sch. Dist.*, 473 F. Supp. 2d 532, 544 (S.D.N.Y. 2007) ("a student is not to be classified as emotionally disturbed merely because of bad behavior"); *Ashland Sch. Dist. v. Parents of Student R.J.*, 585 F. Supp. 2d 1208, 1231 (D. Or. 2008) ("The IDEA does not require schools to remove every impediment to learning of any kind and from any cause."); *with Indep. Sch. Dist. No. 284 v. A.C.*, 258 F.3d 769, 776-77 (8th Cir. 2001) ("[A]t least in Congress's judgment, social and emotional problems are not ipso facto separable from the learning process."); *id.* at 775 ("There is a grey area between normal, voluntary conduct and involuntary physiological response and that area is where Congress has chosen to locate behavioral problems [including drug and alcohol abuse] such as [the ones at issue here].").

If school districts are forced to bear the costs of private education offered at expensive residential facilities for troubled youths, the already stretched public dollars for special education will start to disappear. *See, e.g.*, Kathy McGabe, *Special-Ed Costs Taxing Town Budgets*, The Boston Globe, April 10, 2008; Alison Leigh Cowan, *Amid Affluence, a Struggle Over Special Education*, N.Y. Times, April 24, 2005. IDEA was not meant "to create a federal claim

---

[17] Eligibility under IDEA requires not only qualification within one of the thirteen disability categories, but also a need for special education and related services. 34 C.F.R. § 300.8(a)(2)(i). Thus, a need for drug abuse counseling, psychological or psychiatric services does not create eligibility in and of itself unless the student also needs special education services.

for every activity or type of conduct which may impede an individual's ability to take advantage of the educational opportunities." *Armstrong ex rel Steffensen v. Alicante Sch.*, 44 F. Supp. 2d 1087, 1089 (E.D. Cal. 1999). At some point, this Court must draw a line and prevent spending under IDEA from becoming completely detached from the purpose of the statute – namely, the provision of a free *public* education.

III. UNDER THE SPENDING CLAUSE, CONGRESS COULD NOT HAVE IMPOSED SUCH A BURDEN WITHOUT PROVIDING CLEAR NOTICE.

As explained in Part I, the plain language of the Act compels the conclusion that students who have never received services from public schools are not eligible for reimbursement for private school tuition. *See also* Pet. Br. 24-34. But even if the Court of Appeals were correct that the statutory language is somehow ambiguous, that conclusion would only confirm the error of its ultimate holding. The Spending Clause independently mandates reversal because the statute provides no clear notice that Congress intended to impose on the states the high costs attendant to the Court of Appeals' interpretation.

This Court repeatedly has held that when Congress enacts legislation placing conditions on the receipt of federal funding pursuant to its Spending Clause power, as it has done here, the intent to impose such conditions must be made unambiguously clear in the text of the statute itself. *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[I]f Congress intends to impose a condi-

tion on the grant of federal moneys, it must do so unambiguously."); *see also Rowley*, 458 U.S. at 190 n.11 & 204 n.26. The Court emphasized in *Pennhurst* that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." 451 U.S. at 17. Consistent with basic contract law principles, therefore, the terms of the bargain that Congress asks the States to accept when it imposes conditions on federal funding must be unambiguous – if they are not, the States cannot make a knowing, fully informed decision whether to accept the deal they have been offered. *See id.*

The Court made clear in *Arlington Central* that any inquiry into whether IDEA is sufficiently clear as to the conditions placed on federal funding under it must be undertaken "from the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds." 126 S. Ct. 2455, 2459 (2006). Here, the crucial question is "whether such a state official would clearly understand that one of the obligations of the Act" is to reimburse private school tuition for students who never previously received public school special education and related services, despite the clear statutory language to the contrary. *Id.* The answer is plainly no.

As demonstrated in Part I, the plain language of the statute clearly states that reimbursement is *unavailable* in such circumstances. Even if one refused to accept this plain language and adopted the Court

of Appeals' holding, the "previously received" provision added to IDEA as part of the 1997 Amendments would at least render the reimbursement requirements ambiguous. *See Frank G. v. Bd. of Educ.*, 459 F.3d 356, 370 (2d Cir. 2006) (turning to canons of statutory construction because "the terms of" IDEA "are ambiguous"). But ambiguity may not be read against the recipient of federal funds under the Spending Clause. As discussed above, the costs associated with private school tuition reimbursement are high, *see* Part II, *supra*, and the 1997 Amendments were designed to alleviate the resulting financial pressure felt by school districts. State officials must be afforded clear notice of the full scope of their tuition reimbursement obligations when determining whether to accept conditional federal funding under IDEA. These state officials – aware that Congress intended to lower their costs in 1997 – would be impermissibly blindsided if the opposite reality resulted and their obligations under IDEA instead increased.[18]

---

[18] The magnitude of the costs that would be imposed on school districts under Respondent's interpretation far exceeds that of most cases involving the Spending Clause; the costs potentially imposed under the expert witness fees provision at issue in *Arlington Central*, for example, pale by comparison. While every public school district wants to continue to serve all students, including those with disabilities, costs eventually may become prohibitive. Notably, although Congress originally promised to fund 40% of states' costs of compliance with IDEA, 20 U.S.C. § 1411(a)(2); S. Rep. No. 94-168, at 4, Congress now funds only about 18% of total special education spending. Richard N. Apling, Congressional Research Service, *Individuals with Disabilities Education Act (IDEA): Current Funding Trends* 9 tbl. 5 (Feb. 2005). In this context, where districts al-

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

PAMELA A. HARRIS
SHANNON M. PAZUR
ALLISON ORR LARSEN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

JULIE WRIGHT HALBERT
(*Counsel of Record*)
SUE GAMM
COUNCIL OF THE GREAT CITY SCHOOLS
1301 Pennsylvania Avenue, N.W., Suite 702
Washington, D.C. 20004
(202) 394-2427

Attorneys for Amicus Curiae

Dated: March 4, 2009

---

ready bear the brunt of funding compliance with IDEA, the high additional – and unpredictable – costs imposed by Respondent's interpretation would weigh heavily in the calculus of whether to accept federal funds.

APPENDIX

APPENDIX

Member school districts of the Council of the Great City Schools include Albuquerque Public Schools, Anchorage School District, Atlanta Public Schools, Austin Independent School District, Baltimore City Public Schools, Birmingham City Schools, Boston Public Schools, Broward County Public Schools, Buffalo City School District, Caddo Parish School District, Charleston County Public Schools, Charlotte-Mecklenburg Schools, Chicago Public Schools, Christina School District, Cincinnati Public Schools, Clark County School District, Cleveland Municipal School District, Columbus Public Schools, Dallas Independent School District, Dayton Public Schools, Denver Public Schools, Des Moines Independent Community School District, Detroit Public Schools, District of Columbia Public Schools, Duval County Public Schools, East Baton Rouge Parish School District, Fort Worth Independent School District, Fresno Unified School District, Guilford County Schools, Hillsborough County School District, Houston Independent School District, Indianapolis Public Schools, Jackson Public School District, Jefferson County Public Schools, Kansas City School District, Little Rock School District, Long Beach Unified School District, Los Angeles Unified School District, Memphis City Public Schools, Metropolitan Nashville Public Schools, Miami-Dade County Public Schools, Milwaukee Public Schools, Minneapolis Public Schools, New Orleans Public Schools, New York City Department of Education, Newark Public Schools, Norfolk Public Schools, Oakland Unified School District, Oklahoma City Public Schools, Omaha Public Schools, Orange County Public

Schools, Palm Beach County Schools, Philadelphia Public Schools, Pittsburgh Public Schools, Portland Public Schools, Providence Public Schools, Richmond Public Schools, Rochester City School District, Sacramento City Unified School District, Salt Lake City School District, San Diego Unified School District, San Francisco Unified School District, Seattle Public Schools, St. Louis Public Schools, St. Paul Public Schools, Toledo Public Schools, and Wichita Public Schools.

AMICUS CURIAE BRIEF

No. 08-305

IN THE

Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,

Petitioner,

v.

T.A.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE OF THE DISABILITY RIGHTS LEGAL CENTER, LEARNING RIGHTS LAW CENTER, PUBLIC COUNSEL, CHILDREN AND ADULTS WITH ATTENTION DEFICIT/ HYPERACTIVITY DISORDER, AND CALIFORNIA ASSOCIATION FOR PARENT-CHILD ADVOCACY IN SUPPORT OF RESPONDENT

Paula D. Pearlman
Deborah A Dorfman
DISABILITY RIGHTS
LEGAL CENTER
919 Albany Street
Los Angeles, CA 90015
(213) 736-1195

Terri D. Keville
(*Counsel of Record*)
Hal W. Gibson
Lisa J. Kohn
DAVIS WRIGHT
TREMAINE LLP
865 South Figueroa
Street, Suite 2400
Los Angeles, CA 90017
(213) 633-6800

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF AMICI 1

INTRODUCTION AND SUMMARY OF ARGUMENT 5

ARGUMENT 9

I. School Districts Must And Can Implement Effective "Child Find" Policies; The Law Should Not Encourage Them To Shirk This Essential Duty. 9

A. Congress Imposed An Affirmative Duty Upon States And Local School Districts To Identify Students With Disabilities 10

B. Additional Funding Is Available To Help Provide Services To Children With Qualifying Disabilities, So Districts Should Not Be Encouraged To Evade This Duty In Hard Cases 13

II. Congress's Express Intent Is To Ensure A FAPE For Every Eligible Child Through IDEA. 15

A. IDEA's Legislative History Shows Congress Never Meant To Allow The Families Of Some Children With Qualifying Disabilities To Be Left To Their Own Devices. 15

B. Any Money Saved By Delaying Identification And Provision Of Special Education To Affected Children Will Be Spent Later—Many Times Over—To Deal With Homelessness And Poverty, And To Fund The Law Enforcement, Criminal Justice, And Penal Systems..... 20

III. AD/HD Affects Substantial Numbers of School Children..... 23

IV. Petitioner's Construction Of IDEA Would Disproportionately And Unfairly Impact Lower-Income Families; Low-Income Parents Face Tremendous Difficulties In Trying To Contest School District Decisions To Withhold Special Education Services. 26

V. Children With Disabilities Would Be Harmed By Creating A Substantial Disincentive For School Districts To Find Them Promptly And Identify, Assess, And Provide Services For Their Disabilities Under IDEA. 32

VI. As This Case Shows, School Districts May Blame Substance Abuse For Academic Problems To Avoid Acknowledging That Some Students Need Special Education Because Of Learning Disabilities Or Other Health Impairments. 35

CONCLUSION..... 38

TABLE OF AUTHORITIES

Page

Cases

Arlington v. Murphy,
548 U.S. 291, 126 S.Ct. 2455, 165 L.Ed.2d 5266 (2006) 30

Clay T. v. Walton County Sch. Dist.,
952 F. Supp. 817 (M.D. Ga. 1997)..... 12, 13

Cox v. Brown,
498 F. Supp. 823 (D.D.C. 1980) 7

Dep't of Educ. v. Cari Rae S.,
158 F. Supp. 2d 1190 (D. Haw. 2001) 12

Doe v. Metropolitan Nashville Public Schools,
133 F.3d 384 (1998) 11

Howell v. District of Columbia,
522 F. Supp. 2d 57 (D.D.C. 2007) 7

Mills v. Board of Education,
348 F. Supp. 866 (D.D.C. 1972) 16, 17

New Paltz Cent. Sch. Dist. v. St. Pierre,
307 F. Supp. 2d 394 (N.D.N.Y. 2004) 12

Pennsylvania Ass'n for Retarded Children v. Pennsylvania,
343 F. Supp. 279 (E.D. Pa. 1972) (*PARC*)... 16, 17

Sabatini v. Corning-Painted Post Area Sch. Dist.,
78 F. Supp. 2d 138 (W.D.N.Y. 1999)..... 7

Schaffer v. Weast,
546 U.S. 49, S.Ct. 528, 163 L.Ed.2d 387 (2005) 31

Statutes

20 U.S.C. § 1400, *et seq.* (IDEA) ..... *passim*
20 U.S.C. § 1401(26) 6
20 U.S.C. § 1401(29) 6
20 U.S.C. § 1412 (a)(10)(A)(iii) (2006) 11
20 U.S.C. § 1412 (a)(3) 10
20 U.S.C. § 1412(a)(1) 10
20 U.S.C. § 1412(a)(10)(A)(i) (2006) 11
20 U.S.C. § 1412(a)(10)(A)(ii)(II) (2006) 11
20 U.S.C. § 1412(a)(3)(A) 6
29 U.S.C. § 794(a) 10
42 U.S.C. § 1395x(b)(3) 8
42 U.S.C. § 1395x(ff) 8
42 U.S.C. § 1396d(a)(13) 8
42 U.S.C. § 1396d(r) 34

Regulations

34 Code of Federal Regulations § 300.111(c)(1) 11
34 Code of Federal Regulations § 300.154(a)(1) ... 14
34 Code of Federal Regulations § 300.34(c)(5) 14
34 Code of Federal Regulations § 300.34(c)(13) 14
34 Code of Federal Regulations § 300.502(b)(3) ... 27
34 Code of Federal Regulations § 300.512(a)(1) ... 30
42 Code of Federal Regulations § 440.130(d) 8
73 Federal Regulation 73017 (Dec. 1, 2008) 29

Legislative

121 Cong. Rec. 19482 *et seq.* (1975) 15

121 Cong. Rec. 23710 *et seq.* (1975) 15

121 Cong. Rec. 25534 *et seq.* 15

Congressional Research Service (CRS) Report for Congress "The Individuals with Disabilities Education Act: Congressional Intent" (May 19, 1995) 15

Congressional Research Service (CRS) Report for Congress, *Individuals with Disabilities Education Act (IDEA) and Medicaid* (Jan. 31, 2003 ..... 13, 14

H. Conf. Rep. No. 664, 94th Cong., 1st Sess. (1975) 15

H. Rep. No. 332, 94th Cong., 1st Sess. (1975) 15, 16, 17

P.L. 94-142, the Education of All Handicapped Children Act (1975) 16, 18, 19

S. Conf. Rep. No. 455, 94th Cong., 1st Sess. (1975) 15

S. Rep. No. 168, 94th Cong., 1st Sess. (1975) 15, 16, 18, 19

Other Authorities

A Parents Guide: Understanding the Special Education Hearing Process at the Office of Administrative Hearings, Second Draft 28

American Academy of Child and Adolescent Psychiatry, *Practice Parameters for the Assessment and Treatment of Children, Adolescents, and Adults with Attention-Deficit/Hyperactivity Disorder*, 36 J. Am. Acad. Child Adolesc. Psychiatry (2007) 24

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM IV.* 90 (4th ed. 2000) (DSM IV) 23, 24, 25

Bonnie T. Zima, *et al.*, *Sheltered Homeless Children: Eligibility and Unmet Need for Special Education Evaluations*, 87 Am. J. Public Health (1998) 22

Brooke S. G. Molina & William E. Pelham, *Substance Use, Substance Abuse, and LD Among Adolescents with a Childhood History of AD/HD*, 34 J. Learning Disabilities (2001) ... 36

C.M. Fink, *Special Education in the Service for Correctional Education*, 41 J. Correctional Educ. (1991) 21

California Special Education Division Quarterly Report, Fourth Quarter 2007/2008 Fiscal Year 29

CHADD, *The Disorder Named AD/HD* (Mar. 30, 2009) 23

Demetra D. Karacostas & Gary L. Fisher, *Chemical Dependency in Students With and Without Learning Disabilities*, 26 J. Learning Disabilities (1993) 35, 36

Diagnosed Attention Deficit Disorder and Learning Disability: United States, 2004-2006, Vital and Health Statistics, Series 10, No. 237, July 2008 24

Diane Pedrotty Bryant, *Commentary on Early Identification and Intervention for Students with Mathematics Difficulties*, 38 J. Learning Disabilities 340 (2005) 34

Dignity in Schools Campaign, *The Right to Education in the Juvenile and Criminal Justice Systems in the United States: Submission to Vernor Munoz Special Rapporteur on the Right to Education Human Rights Council, United Nations* (Dec. 31, 2008) 21

Frances R. Levin & Herbert D. Kieber, *Attention-Deficit Hyperactivity Disorder and Substance Abuse: Relationships and Implications for Treatment*, 2 Harv. Rev. Psychiatry (1995) 36

G. Reid Lyon, *et al., Rethinking Learning Disabilities, in Rethinking Special Education for a New Century* (2001) 33, 34

Himanshu P. Upadhyaya, *Managing Attention-Deficit/Hyper-activity Disorder in the Presence of Substance Use Disorder*, 68 J. Clin. Psychiatry (2007) 37

Jeffrey J. Wilson & Frances Levin, *Attention-Deficit/Hyperactivity Disorder and Early-Onset Substance Abuse Disorders*, 15 J. Child & Adolescent Physchopharamacology (2005) 36

Jiyeon Park, Ann P. Turnbull, & H. Rutherford Turnbull III, *Impacts of Poverty on Quality of Life in Families of Children with Disabilities*, 68 Exceptional Children (2002) 7, 27

John W. Maag, *et al.*, *Prevalence and Predictors of Substance Use: A Comparison Between Adolescents With and Without Learning Disabilities*, 27 J. Learning Disabilities (1994) 35, 36

Joseph R. Jenkins, *Early Identification and Intervention for Young Children with Reading/Learning Disabilities* (2001) 34

Lara E. Embry, *Risk Factors for Homelessness in Adolescents Released from Psychiatric Residential Treatment*, 39 J. Am. Acad. Child Adolesc. Psychiatry (2000) 22

Marty Beyer, *Fifty Delinquents in Juvenile and Adult Court*, 76 Am. J. Orthopsychiatry 206 (2006) 21

Mary Magee Quinn, *et al.*, *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 Exceptional Children 339 (2005) 22

Measuring Progress in Public and Parental Understanding of Learning Disabilities (2000) 32

Medicare National Coverage Determinations Manual 8

Melanie A. Barwick & Linda S. Siegal, *Learning Difficulties in Adolescent Clients of a Shelter for Runaway and Homeless Street Youths*, 6 J. Research on Adolescence (1996) 22

Nancy Lee Jones & Ann Lordeman, *The Individuals with Disabilities Act: Final Part B Regulations*, Cong. Res. Service (December 11, 2008) 29

Nicholas Freudenberg, *Coming Home from Jail: A Review of Health and Social Problems Facing US Jail Populations and of Opportunities for Reentry Interventions* (2009) 21

Oscar Bukstein, *Substance Abuse in Patients with Attention-Deficit/Hyperactivity Disorder*, 10 Medscape J. 24 (2008) 36, 37

Perry A. Zirkel, *Lay Advocates and Parent Experts under the IDEA*, 217 Ed. Law. Rep. 19 (May 3, 2007) 29, 30

Peter E. Leone, *et al.*, *Understanding the Over-representation of Youths with Disabilities in Juvenile Detention*, 3 D.C. L. Rev. 389, 389 (1995) 21

Regina L. Enwefa, Stephen C. Enwefa, & Robert Jennings, *Special Education: Examining the Impact of Poverty on Quality of Life of Families of Children with Disabilities*, Forum on Public Policy 3 (2006) ... 26

Ronald C. Kessler, *et al.*, *The Prevalence and Correlates of Adult ADHD in the United States: Results from the National Comorbidity Survey Replication*, 163 Am. J. Psychiatry 724 (2006) 24

Russell A. Barkley, Attention-*Deficit Hyperactivity Disorder: A Handbook for Diagnosis and Treatment* (2006) 25

Salvatore Mannuzza & Rachel G. Klein, *Long-Term Prognosis in Attention-Deficit/Hyperactivity Disorder*, 9 Child Adolescent Psychiatric Clinics N. Am. (2000) ... 37

Stephen V. Faraone, Joseph Biederman, & Eric Mick, *The Age-Dependent Decline of Attention-Deficit Hyperactivity Disorder: A Meta-Analysis of Follow-Up Studies*, 36 Psych Med 159 (2005) 24

The Special Education Elementary Longitudinal Study funded by the Office of Special Education Programs (OSEP) in the U.S. Department of Education (March 17, 2009) 27

Timothy E. Wilens, *et al.*, *Attention Deficit Hyperactivity Disorder (AD/HD) Is Associated with Early Onset Substance Use Disorders*, 185 J. Nervous & Mental Disease (1997) 37

U.S. Centers for Disease Control and Prevention, Mental Health in the United States: Prevalence of Diagnosis and Medication Treatment for Attention-Deficit/Hyperactivity Disorder—United States, 2003 (2005) 23

U.S. Code Cong. & Ad. News 1425 ..... 15, 16, 18, 19

STATEMENT OF INTEREST OF AMICI[1]

Amicus Curiae Disability Rights Legal Center (DRLC) is a non-profit organization devoted to promoting the rights of people with disabilities, as well as public interest in and awareness of those rights, by providing legal and related services. The DRLC accomplishes this mission through a number of programs, including the Civil Rights Litigation Program, the Cancer Legal Resource Center (a joint program with Loyola Law School), the Education Advocacy Program, the Options Counseling program, the Lawyer Referral Service, the Inland Empire Program, and the Community Outreach Program. The DRLC has handled disability rights cases since 1975, including numerous special education cases under both federal and California law.

The mission of the non-profit Learning Rights Law Center (LRLC) is to ensure that students have equitable access to the public education system. LRLC focuses its efforts on students with learning disabilities or difficulties; students involved or at risk of becoming involved in the child welfare and/or juvenile justice systems; and students not accessing the public school system because of disability, homelessness, and other

---

[1] As indicated on the Court's on-line docket, the parties granted consent to the filing of this amicus curiae brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

factors. LRLC advocates for justice in education through a variety of initiatives including its civil rights litigation program.

Public Counsel is the public interest law office of the Los Angeles County and Beverly Hills Bar Associations and the Southern California affiliate of the Lawyers' Committee for Civil Rights Under Law. Established in 1970, Public Counsel is dedicated to advancing equal justice under law by delivering free legal and social services to indigent and underrepresented children, adults, and families throughout Los Angeles County. Public Counsel's Children's Rights Project provides education rights representation and advocacy for the most vulnerable children in Los Angeles, including children with special needs, foster youth, and homeless children. Because these children already face innumerable obstacles to receiving a free and appropriate public education and their families lack the resources to ensure that they are receiving the education benefits guaranteed under law, Public Counsel has a direct interest in ensuring that the Individuals with Disabilities in Education Act (IDEA)[2] is not violated and that the specific protections provided by IDEA are accurately

---

[2] 20 U.S.C. § 1400 *et seq.* This law has evolved over time since its original enactment as the Education for all Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773. The current version of the law was enacted as part of the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), Pub. L. No. 108-446, 118 Stat. 2647. IDEA constitutes Title I of IDEIA, and the provisions at issue in this case are part of IDEA.

implemented and fully enforced.

CHADD (Children and Adults with Attention-Deficit/Hyperactivity Disorder) is committed to improving the lives of individuals with AD/HD and represents individuals of all ages with AD/HD, their families, and the professionals who work with them. CHADD was founded by parents in 1987 in response to the frustration and sense of isolation experienced by parents and their children. CHADD is the leading national non-profit organization for children and adults with AD/HD, providing the public and providers with education, advocacy, and support. CHADD has 12,000 members, and networks every week with over 70,000 individuals, mostly families of children and adults with AD/HD. About 1,200 CHADD members are professionals providing clinical, research, and other services to persons with AD/HD. CHADD has over 200 chapters and almost 300 "Parent to Parent" certified teachers throughout the country. In addition, CHADD produces the bi-monthly *Attention* magazine, and sponsors an annual conference. The National Resource Center on AD/HD (NRC) is the national clearinghouse for evidence-based information about AD/HD funded by the Centers for Disease Control and Prevention (CDC).

CAPCA (California Association for Parent-Child Advocacy) is an all-volunteer organization of parents, advocates, professionals, and attorneys that monitors policy and sponsors legislation affecting the education and life-long prospects of children, adolescents, and young adults with disabilities. Since 2003, CAPCA has

provided information and advocacy to the California legislature regarding special education issues, helping to prevent adverse changes in state law and policy and acting to expand special education rights. Many of the students for whom CAPCA and its members advocate have families who cannot afford or otherwise access private special education services, and for such students, CAPCA is deeply concerned about potential reduction of the already minimal accountability of districts for identifying and meeting disability-related educational needs. Because of CAPCA's work and its members' actions on behalf of families and students, CAPCA has a direct interest in ensuring that IDEA is not violated, that educational supports are available on a timely basis, and that the specific protections provided by IDEA are accurately implemented and fully enforced.

This case is of interest and concern to *amici* DRLC, LRLC, Public Counsel, CHADD, and CAPCA because the children with disabilities and their families whom these amici serve in the area of educational rights will experience significant adverse effects unless this Court affirms the Ninth Circuit's interpretation of IDEA. Adopting a contrary interpretation would allow and even incentivize school districts to neglect their "Child Find" obligations under IDEA, because the districts could avoid their duty to fund private education for children with disabilities that cannot be addressed by the district's own programs, simply by failing to identify those children as having qualifying disabilities.

Such an interpretation of IDEA would have a disproportionate impact on lower income families by forcing parents of children with disabilities whom their districts never identify to shoulder the costly burden of independent evaluation and education of their children, a burden that Congress clearly intended the States to bear. Even if the parents of such children manage to overcome the obstacles to obtaining accurate evaluations of their children's disabilities and finding appropriate private educational settings, the districts never would be obligated to pay for the "free appropriate public education" of those children because the district never recognized them or refused to recognize them. Therefore, it never provided these children with any special education services. Congress plainly did not intend IDEA to contain such a loophole for children with disabilities who cannot be served appropriately in their local public schools.

The Ninth Circuit's decision implements the fundamental purposes and express mandates of IDEA as enacted by Congress and recognized by the courts. DRLC, LRLC, Public Counsel, CHADD, and CAPCA write to provide material background and perspective on the reasons why this Court should affirm that decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

Free public education through high school for all children has been an essential component of the American promise for nearly 100 years. Congress enacted IDEA, our nation's special

education law, to protect the rights of students with disabilities by requiring that all students, including those with disabilities, receive "free appropriate public education" (FAPE). This right is particularly important to low-income families, who cannot afford independent assessments, private education or other support services if a public school fails to provide them. IDEA not only mandates equal access for students with disabilities eligible for special education and related services,[3] but also imposes upon States and their local school districts the affirmative duty to identify those children and ensure that they receive educational services appropriate to their needs. 20 U.S.C. § 1412(a)(3)(A). Not all disabilities are obvious, and those that impede learning may not be easily recognized.

This case is about a student's right to have a timely and comprehensive eligibility assesment in all areas of suspected disability provided by the school at no expense to the parents. The school's failure to assess the student's needs accurately and timely, and the concomitant lack of special education instruction and related services, lead to devastating consequences for the student and society. Courts have recognized that students who do not timely receive all of the special education and related services they need are

---

[3] 20 U.S.C. § 1401(29) ("'[S]pecial education' means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability . . ."); 20 U.S.C. § 1401(26) (defining "related services").

irreparably harmed.[4] Consequently, absent timely and comprehensive assessments and subsequent provision of services, many children ultimately need more services than they would have required if served properly initially.

This case also raises serious implications for children of low-income parents, who have few, and often no, resources to pay for private educational services when the public school fails to identify and provide for the educational needs of their children. Additionally, these families do not have the means to pay an attorney to advocate the rights of their children when schools fail or refuse to carry out their IDEA obligations. If the Ninth Circuit's decision is not upheld, the number of children who would be adversely affected is significant, as 28% of families of children with disabilities live below the poverty line.[5]

---

[4] *Howell v. District of Columbia*, 522 F. Supp. 2d 57, 64 (D.D.C. 2007) (*quoting Cox v. Brown*, 498 F. Supp. 823, 829 (D.D.C. 1980)) ("Students suffer irreparable harm when they 'lack [] each day of their young lives an appropriate education, one that is sensitive to their particular disabilities, commensurate to their levels of understanding, and fulfilling their immediate needs.'"); *Sabatini v. Corning-Painted Post Area Sch. Dist.*, 78 F. Supp. 2d 138, 143 (W.D.N.Y. 1999) ("The denial of a FAPE over an extended period of time does constitute harm and the longer that denial continues, the more irreparable it becomes").

[5] Jiyeon Park, Ann P. Turnbull, & H. Rutherford Turnbull III, *Impacts of Poverty on Quality of Life in Families of Children with Disabilities*, 68 Exceptional Children 150, 152 (2002) ("Twenty-eight percent of children with disabilities, ages 3-21,

The school district's actions in this case also highlight another problem for some children with disabilities and their parents, which would be exacerbated by adopting petitioner's interpretation of the law. One apparent reason why Forest Grove School District refused to recognize that T.A. needed special education was that—like many teens who struggle in school due to learning disabilities (LD) or other health impairments (OHI)—T.A. used marijuana to relieve his depression. However, numerous studies have shown that drug use often is the effect, rather than the cause, of disabilities that adversely affect learning.

We do not allow drug addiction or dependence to prevent people from receiving medical treatment for depression or other conditions that may accompany substance abuse—indeed, beneficiaries of government healthcare programs can receive treatment for both at public expense.[6] If school districts were allowed to use the accompanying symptom of drug use as an excuse to stigmatize some children with disabilities, and refuse to recognize those students as having disabilities and entitlement to FAPE, our society as a whole would suffer—because those students never would receive the education and skills they need to become productive citizens.

---

are living in families whose total income is less than the income threshold set by the U.S. census bureau").

[6] *See* 42 U.S.C. §§ 1395x(b)(3) and (ff); *Medicare National Coverage Determinations Manual*, Pub. 100--3, Ch. 1, §§ 130.1 to 130.7; 42 U.S.C. §§ 1396d(a)(13); 42 C.F.R. § 440.130(d).

The Ninth Circuit correctly held that under some circumstances, school districts may be required to pay for private education of students with disabilities for whom the districts failed to provide an IEP and a FAPE because they failed to recognize the students as having qualifying disabilities. This Court should affirm.[7]

ARGUMENT

I. School Districts Must And Can Implement Effective "Child Find" Policies; The Law Should Not Encourage Them To Shirk This Essential Duty.

Congress explicitly imposed on States and local school districts the duty of developing and implementing effective procedures to identify children with disabilities and then provide them with appropriate services. The Ninth Circuit properly rejected the argument that if a district fails to identify a child as having a disability qualifying him or her for special education services, then the district is forever off the hook financially, because it can never be required to fund private education for a student to whom it

---

[7] DRLC, LRLC, Public Counsel, CHADD, and CAPCA express no opinion about the appropriateness or merits of T.A.'s particular educational placement. Rather, these *amici* support the Ninth Circuit's holding that sometimes a school district may be obliged to pay for a child's private special education even though the district had not previously provided special education services to that child—where the child never received such services from the district due to district's own failure to fulfill its IDEA obligations (not just the parents' unilateral choice).

never provided public special education services. That is not and should not be the law, because it undermines the affirmative duty of school districts and other local education agencies to find and assess students with disabilities to determine their eligibility for such services, and actually incentivizes districts not to identify students with disabilities (despite their parents' entreaties), particularly in the most difficult cases—where the district could not meet the students' needs itself, so only private education would be "appropriate."

A. Congress Imposed An Affirmative Duty Upon States And Local School Districts To Identify Students With Disabilities.

Federal money the States receive to fund education comes with conditions: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." 29 U.S.C. § 794(a). Thus, no State or local district can deny a child with a disability eligible for special education the benefits of a free education. This obligation toward children with learning disabilities also is codified under IDEA. 20 U.S.C. § 1412(a)(1).

One of IDEA's most important provisions is the Child Find mandate, which requires States to develop and implement practical methods of determining which children with disabilities are receiving special education and related services

and which children are not receiving the services they need. 20 U.S.C. § 1412(a)(3). This mandate applies to all children residing within a State, including those attending both private and public schools,[8] highly mobile children, migrant children, homeless children, and wards of the state. *Id.* The comprehensive Child Find mandate also applies to children like T.A. who receive passing grades and are "advancing from grade to grade." 34 C.F.R. § 300.111(c)(1). This provision recognizes that a child with a disability who appears to be "getting by" nevertheless may not be receiving an appropriate education.

In some instances parents may be entitled to reimbursement for private education even where they did not request that their local public school district identify and evaluate their child. For example, in *Doe v. Metropolitan Nashville Public Schools*, the Sixth Circuit reversed the district court's dismissal of the parents' claim alleging Child Find violations, and remanded the case for trial, holding that summary judgment was not appropriate. 133 F.3d 384 (1998), *cert. denied*, 525 U.S. 813 (1998). The district court held that because Doe's parents had unilaterally placed him

---

[8] 20 U.S.C. § 1412(a)(10)(A)(ii)(II) (2006); *see also* 20 U.S.C. § 1412(a)(10)(A)(i) (2006) (requiring school districts to devote funding to private school children with disabilities in the amount of federal IDEA Part B funds proportionate to the number of children enrolled in private schools within the district); 20 U.S.C. § 1412 (a)(10)(A)(iii) (2006) (imposing the requirement that local education agencies consult representatives of private schools and parents of privately placed children during the design and development of services for children with disabilities).

in private school without providing the school district an opportunity to evaluate or create an IEP for him, the district was not obligated to reimburse them. *Id.* at 385. The Sixth Circuit reversed and remanded, holding that summary judgment was inappropriate because genuine issues of material fact remained, including the extent of the parents' knowledge that they could obtain services from the school district and the degree of the district's laxity in its Child Find efforts. *Id.* at 387. The appellate court stated that where the parents claimed "the lack of dialogue stems from the school district's failure to conduct sufficient 'child find,' reimbursement may be appropriate." *Id.* at 387-88.

Other judicial decisions similarly have resulted in tuition awards based on Child Find violations. For example, in *New Paltz Cent. Sch. Dist. v. St. Pierre*, the court awarded tuition reimbursement for a child who was not evaluated after the parent informed the superintendent of the child's emotional difficulties and a school psychologist recommended placement. 307 F. Supp. 2d 394, 402 (N.D.N.Y. 2004). In *Dep't of Educ. v. Cari Rae S.*, the court found the state responsible for the cost of hospitalization for failure to refer and evaluate a student earlier. 158 F. Supp. 2d 1190, 1200 (D. Haw. 2001).[9]

---

[9] *Cf. Clay T. v. Walton County Sch. Dist.*, 952 F. Supp. 817, 823 (M.D. Ga. 1997) ("in order to establish that the school violated the identification requirements of IDEA, Plaintiff must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or

Here, the district essentially conducted half an evaluation, stopping after it determined T.A. did not have a learning disability, and completely ignoring the possibility of another health impairment such as AD/HD. Pet. App. 3a, n.1.[10]

B. Additional Funding Is Available To Help Provide Services To Children With Qualifying Disabilities, So Districts Should Not Be Encouraged To Evade This Duty In Hard Cases.

While not all services required under IDEA are funded by it, once children are identified as having disabilities, there are other funding sources for certain services. For example, to assist the States in this regard, Congress allows them to use Medicaid funds to finance health services delivered to special education students enrolled in Medicaid.[11] The IDEA defines "related services" to include medical services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related

---

that there was no rational justification for not deciding to evaluate").

[10] Thus, if the district's failure to meet its Child Find obligations were at issue here (which *amici* recognize it is not), this case would meet even the apparently stricter standard articulated in *Clay T.*

[11] Cong. Res. Service (CRS) Report for Congress, *Individuals with Disabilities Education Act (IDEA) and Medicaid* (January 31, 2003); available at http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-7575:1 (last visited Mar. 14, 2009).

services (34 C.F.R. § 300.34(c)(5)) and health services provided by another qualified person such as a school nurse or physical therapist, to enable a child with a disability to receive a FAPE (34 C.F.R. § 300.34(c)(13)). Notably, "[t]he financial responsibility of . . . the State Medicaid agency and other public insurers of children with disabilities must precede the financial responsibility of the [school district] (or the State agency responsible for developing the child's IEP)" with regard to a disabled child enrolled in both IDEA and Medicaid, when necessary services are covered by the state's Medicaid program. 34 C.F.R. § 300.154(a)(1).

Medicaid covers a number of services relevant to IDEA such as wheelchairs, ventilators, and prosthetic devices. Medicaid also covers therapy services for children with orthopedic impairments and speech disorders, as well as vision-related screening, diagnostic services, and eyeglasses. Children who have hearing disorders may receive audiology services and hearing aides. In some cases, non-medical supportive services such as psychosocial rehabilitation and assistance with daily activities provided by a professional attendant may be covered. Finally, Medicaid may cover psychologist and social worker services, prescribed drugs, and transportation.[12]

---

[12] See CRS Report, *supra* note 11.

II. Congress's Express Intent Is To Ensure A FAPE For Every Eligible Child Through IDEA.

A. IDEA's Legislative History Shows Congress Never Meant To Allow The Families Of Some Children With Qualifying Disabilities To Be Left To Their Own Devices.

IDEA's legislative history points to four main reasons for its enactment:[13] (1) increased awareness of the needs of children with disabilities; (2) judicial decisions recognizing a constitutional requirement to educate children with disabilities; (3) inability of States and local agencies to fund the cost of educating these children themselves; and (4) a belief that educating children with disabilities would help them to become productive members of society and lessen the burden on taxpayers.

What is now IDEA originally was enacted in

---

[13] Cong. Res. Service (CRS) Report for Congress, *The Individuals with Disabilities Education Act: Congressional Intent* (May 19, 1995); available at http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-7997:1 (last visited Feb. 27, 2009). Materials examined for this report included the House and Senate Reports, the House and Senate Conference Reports, and the House and Senate debates. H. Rep. No. 332, 94th Cong., 1st Sess. (1975); S. Rep. No. 168, 94th Cong., 1st Sess. (1975), reprinted in [1975] U.S. Code Cong. & Ad. News 1425; H. Conf. Rep. No. 664, 94th Cong., 1st Sess. (1975); S. Conf. Rep. No. 455, 94th Cong., 1st Sess. (1975), reprinted in [1975] U.S. Code Cong. & Ad. News 1480 (1975); 121 Cong. Rec. 19482 *et seq.* (1975); 121 Cong. Rec. 23710 *et seq.* (1975); and 121 Cong. Rec. 25534 *et seq.*

1975 as P.L. 94-142, the Education of All Handicapped Children Act (1975). The legislative history of P.L. 94-142 demonstrates congressional awareness of the need to educate children with disabilities. For example, both the House and Senate Reports note that statistics provided by the Bureau for the Education of the Handicapped in the then Department of Health, Education and Welfare indicated that only 3.9 million of the more than 8 million children with disabilities in the U.S. were receiving an appropriate education, with 1.75 million such children receiving no educational services at all.[14]

Additionally, the legislative history of P.L. 94-142 indicates the law was at least in part a response to several court decisions, notably *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972) (*PARC*), and *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972). For example, the Senate report stated that the legislation as originally introduced "followed a series of landmark cases establishing in law the right to education for all handicapped children."[15]

PARC was a class action suit brought by a state association and parents of certain children with mental disabilities. The suit claimed the state statutes excluding these children from

---

[14] H. Rep. No. 332, 94th Cong., 1st Sess. 11 (1975); *see also* S. Rep. 168, 94th Cong., 1st Sess., reprinted in [1975] U.S. Code Cong. & Ad. News 1425, 1432.

[15] S. Rep. No. 168, 94th Cong., 1st Sess., reprinted in [1975] U.S. Code Cong. & Ad. News 1425, 1430.

public school education were unconstitutional. It was settled when the parties joined in a consent decree stating (in part) that each of these children must have access to a free public program of education and training appropriate to his or her capacity and, if possible, receive instruction in a class with children who are not disabled. Although the *PARC* court was not required to decide the constitutional issues, it nevertheless noted that it "was satisfied that the plaintiffs have established a colorable [equal protection] constitutional claim . . . ." *Id.* at 283 n.8. This language provided support for later cases, including *Mills*.

Mills was brought on behalf of seven children excluded from the District of Columbia's public schools after being labeled as behavioral problems, mentally retarded, emotionally disturbed, or hyperactive. These children had received no hearings or review of the decisions to exclude them. *Mills* at 868. The *Mills* court held it was a denial of constitutional due process to suspend or expel a child without a prior hearing. *Id.* at 874.

The House Report noted that after the *PARC* and *Mills* cases, "there have been 46 cases which are completed or still pending in 28 States."[16] These decisions were described as "a nationwide movement in both State and Federal courts to establish that all handicapped children have a constitutional right to a public education."[17] The

---

[16] H. Rep. No. 332, 94th Cong., 1st Sess. (1975).

[17] *Id.* at 10.

legislative history of P.L. 94-142 also indicates that parents should not be forced to rely upon time-consuming judicial action to obtain public education for their children with disabilities. The Senate report specifically stated:

> It is this Committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity. It can no longer be the policy of the Government to merely establish an unenforceable goal requiring all children to be in school. S. 6 takes positive necessary steps to ensure that the rights of children and their families are protected.[18]

Further impetus for the enactment of P.L. 94-142 was the inability of States and localities to fund education for children with disabilities on their own. The Senate Report observed that States had attempted to comply with the judicial decisions mandating a right to education, but that

---

[18] S. Rep. No. 168, 9th Cong., 1st Sess. (1975), reprinted in [1975] U.S. Code Cong. & Ad. News 1425, 1433. This language was echoed in the Senate debate during a discussion by Senator Williams, the chairman of the Committee considering the legislation. "It is time that Congress took strong and forceful action. It is time for Congress to assure equal protection of the laws and to provide to all handicapped children their right to education." 121 Cong. Rec. 19485 (1975) (remarks of Sen. Williams).

"lack of financial resources have [sic] prevented the implementation of the various decisions which have been rendered."[19]

Practical rationales also supported the enactment of P.L. 94-142. Following a discussion of the statistics showing the number of children with disabilities who were not receiving an appropriate education, the Senate Report discussed the practical implications of these facts:

> The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society.[20]

The Senate Report also notes that providing educational services would help to decrease the number of persons in institutions. "One need only look at public institutions to find thousands of persons whose families are no longer able to care

---

[19] S. Rep.No. 168, 94th Cong., 1st Sess. (1975), reprinted in [1975] U.S. Code Cong. & Ad. News 1425, 1431.

[20] S. Rep. No. 168, 94th Cong., 1st Sess. (1975), reprinted in [1975] U.S. Code Cong. & Ad. News 1425, 1433.

for them and who themselves have received no educational services. Billions of dollars are expended each year to maintain persons in these subhuman conditions."[21]

Congress meant to improve the lives and prospects of children with qualifying disabilities by ensuring that the government provides free appropriate education to all of them. Parents may choose to fund private education themselves, but they should not be forced into that option because the district failed to identify a disability requiring special education instruction and related services.

B. Any Money Saved By Delaying Identification And Provision Of Special Education To Affected Children Will Be Spent Later—Many Times Over—To Deal With Homelessness And Poverty, And To Fund The Law Enforcement, Criminal Justice, And Penal Systems.

IDEA compels States to identify and provide services to children with qualifying disabilities. While the expense of this duty may burden state budgets, failing to educate these children creates an even greater financial burden, as all too often children with untreated disabilities become teenagers and adults ill-equipped to cope with the stresses of modern society. Crime, poverty, and homelessness are a common result.

For example, the professional literature in the

---

[21] *Id.*

area of correctional education states that the number of students with disabilities eligible for special education in adult correctional facilities throughout the United States ranges from 30-50%.[22] The number of youth with disabilities eligible for special education in juvenile detention is estimated to be up to 70%.[23] One study found that 17-53% of juvenile delinquents have learning disabilities, and 19-46% of delinquents are diagnosed with AD/HD, in comparison to 2-10% of the general child population.[24] Consistent with these findings, the number of students age 6 to 21 receiving special education in juvenile corrections is almost four times higher than in public school

---

[22] C.M. Fink, *Special Education in the Service for Correctional Education*, 41 J. Correctional Educ. 186 (1991) (in adult correctional facilities 30-50% of inmates need special education); Nicholas Freudenberg, *Coming Home from Jail: A Review of Health and Social Problems Facing US Jail Populations and of Opportunities for Reentry Interventions*, available at http://urban.org/reentryroundtable/inmate_challegens.pdf (last visited Mar. 27, 2009); Dignity in Schools Campaign, *The Right to Education in the Juvenile and Criminal Justice Systems in the United States: Submission to Vernor Munoz Special Rapporteur on the Right to Education Human Rights Council, United Nations* (Dec. 31, 2008), available at http://www.dignityinschools. org/news-and-events#46 (last visited Mar. 26, 2009) ("People in state prison have significant educational needs . . . 40% had a disabling condition that interfered with learning").

[23] Peter E. Leone, *et al.*, *Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention*, 3 D.C. L. Rev. 389, 389 (1995) (studies estimate the prevalence rate of disabling conditions among incarcerated juveniles is up to 70%).

[24] Marty Beyer, *Fifty Delinquents in Juvenile and Adult Court*, 76 Am. J. Orthopsychiatry 206, 208 (2006).

programs.[25] "The prevalence of [learning disorders] among the juvenile justice population has led some professionals to characterize juvenile justice as a 'default system' for youth who can't read or write well, who have mental health problems, and who drop out or are forced out of school."[26]

The prevalence of learning disabilities and AD/HD among homeless children and adults is also significantly higher than in the overall population. Six to 31% of homeless youth have AD/HD.[27] One study found that 45% of homeless children living in shelters merited a special education evaluation, yet only 23% had received special education testing and services.[28] Another study of sheltered homeless youth age 16 to 21 found that 52% had a reading disability and 28.5% had an arithmetic disability.[29] That study concluded, "Given the high prevalence of learning difficulties in our sample, it is possible that

---

[25] Mary Magee Quinn, *et al.*, *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 Exceptional Children 339, 342 (2005).

[26] *Id.* at 340 (citations omitted).

[27] Lara E. Embry, *Risk Factors for Homelessness in Adolescents Released from Psychiatric Residential Treatment*, 39 J. Am. Acad. Child Adolesc. Psychiatry 1293 (2000).

[28] Bonnie T. Zima, *et al.*, *Sheltered Homeless Children: Eligibility and Unmet Need for Special Education Evaluations*, 87 Am. J. Public Health 236, 240 (1998).

[29] Melanie A. Barwick & Linda S. Siegal, *Learning Difficulties in Adolescent Clients of a Shelter for Runaway and Homeless Street Youths*, 6 J. Research on Adolescence 649, 649 (1996).

learning difficulties and underlying processing deficits placed certain individuals at risk and may even have contributed to the dysfunctional experiences that precipitated their homelessness."[30]

III. AD/HD Affects Substantial Numbers of School Children.

AD/HD is a common neurobiological condition affecting 5-8% of school-age children.[31] AD/HD is characterized by developmentally inappropriate levels of inattention, impulsivity, and hyperactivity.[32] A 2005 CDC report found that parents reported approximately 7.8% of school-age children (4 to 17 years) had a history of AD/HD diagnosis and that about half of these (4.3%) were treated with medication.[33] Other studies show that more than 70% of children with AD/HD will continue to experience symptoms of AD/HD into adolescence, and almost 65% will

---

[30] *Id.* at 664.

[31] CHADD, *The Disorder Named AD/HD (WWK1)*, available at http://www.help4adhd.org/en/about/what/WWK1 (last visited Mar. 30, 2009); *cf.* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM IV* 90 (4th ed. 2000) (DSM IV) (estimating 3-7% at that time).

[32] *Id.* at 85.

[33] U.S. Centers for Disease Control and Prevention, *Mental Health in the United States: Prevalence of Diagnosis and Medication Treatment for Attention-Deficit/Hyperactivity Disorder—United States, 2003* (2005), available at: http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5434a2.htm.

exhibit AD/HD characteristics as adults.[34] In addition, as many as two-thirds of children with AD/HD have at least one co-existing condition.[35] According to U.S. Department of Health and Human Services data regarding diagnosed AD/HD and LD, between 2004 and 2006 approximately 8.6% of children between 6 and 17 years of age had either LD alone or LD combined with AD/HD.[36]

A number of national organizations recognize AD/HD as a condition that can significantly impair an individual's functioning at work, at school, or in society.[37]

The American Psychiatric Association's DSM IV provides the criteria used by doctors, mental

---

[34] Stephen V. Faraone, Joseph Biederman, & Eric Mick, *The Age-Dependent Decline of Attention-Deficit Hyperactivity Disorder: A Meta-Analysis of Follow-Up Studies*, 36 Psych Med 159 (2005); Ronald C. Kessler, *et al.*, *The Prevalence and Correlates of Adult ADHD in the United States: Results from the National Comorbidity Survey Replication*, 163 Am. J. Psychiatry 724 (2006).

[35] American Academy of Child and Adolescent Psychiatry, *Practice Parameters for the Assessment and Treatment of Children, Adolescents, and Adults with Attention-Deficit/Hyperactivity Disorder*, 36 J. Am. Acad. Child Adolesc. Psychiatry 894, 895 (2007).

[36] *Diagnosed Attention Deficit Disorder and Learning Disability: United States, 2004-2006*. Vital and Health Statistics, Series 10, No. 237, July 2008.

[37] These organizations include: The American Medical Association, the Surgeon General of the United States, the National Institutes of Health, the CDC, the American Academy of Pediatrics, and the American Academy of Child and Adolescent Psychiatry.

health professionals, and other qualified clinicians when making a diagnosis of AD/HD. The diagnostic criterion for AD/HD states that the essential feature of AD/HD is a "persistent pattern of inattention and/or hyperactivity—impulsivity that is more frequent and severe than is typically observed in individuals at a comparable level of development."[38] In addition, the behaviors must create significant difficulty in at least two areas of life, such as home, social settings, school, or work, and be present for a minimum of six months.[39]

If untreated or inadequately treated, AD/HD can have serious consequences, increasing an individual's risk for school failure, unemployment, interpersonal difficulties, other mental health disorders, substance and alcohol abuse, injury, antisocial and illegal behavior, contact with law enforcement, and shortened life expectancy.[40] Appropriate identification, services, and treatment can help individuals with AD/HD avoid negative outcomes and lead successful lives.

---

[38] DSM IV, *supra* note 31, at 85.

[39] *Id.* at 86.

[40] Russell A. Barkley, Attention-*Deficit Hyperactivity Disorder: A Handbook for Diagnosis and Treatment* 165, 265-75 (2006).

IV. Petitioner's Construction Of IDEA Would Disproportionately And Unfairly Impact Lower-Income Families; Low-Income Parents Face Tremendous Difficulties In Trying To Contest School District Decisions To Withhold Special Education Services.

Petitioner's interpretation of IDEA not only would incentivize school districts to evade their Child Find duties in the most difficult cases, but also would thereby increase the burdens on families, by shifting this responsibility from the States to the parents of children with disabilities. That would place the responsibility on those who are least equipped to handle it, as children growing up in lower income families are more likely to have disabilities.

Recent studies have found that there is a direct correlation between disability and poverty, and that children living in poverty are much more likely to have a disability than those children living in affluence.[41] These studies also have shown that the number of children living in poverty who have disabilities has dramatically increased in the last decade.[42] Almost 20% of children with disabilities live in households with

---

[41] Regina L. Enwefa, Stephen C. Enwefa & Robert Jennings, *Special Education: Examining the Impact of Poverty on Quality of Life of Families of Children with Disabilities*, Forum on Public Policy 3 (2006), available at https://secure.oldhamcounty.com/forumonpublicpolicy/archive06/enwefa.pdf (last visited Mar. 28, 2009).

[42] *Id.* at 2.

annual incomes of less than $15,000.[43] In contrast, only 12.5% of households in the general population fall below this income level.[44] A student with a disability is 50% more likely to live in poverty than a student without a disability. *Id.* Thus, the tremendous challenges facing the parents of children with disabilities often are compounded by financial constraints. For example, a key component of many school districts' Child Find process is the assessment, in which a child is evaluated to determine eligibility for special education services. If parents disagree with the school district's assessment, the parents may request an independent evaluation of the child at the district's expense, but the district can choose to defend its assessment in an administrative hearing—a daunting prospect both psychologically and financially for low-income parents. Moreover, if the administrative law judge (ALJ) concludes in the hearing that the district's assessment was appropriate, the parents can obtain an independent assessment only at their own expense. 34 C.F.R. § 300.502(b)(3).

Whenever there is disagreement with the school district regarding identification, evaluation, reevaluation, classification, educational placement, provision of a FAPE, or disciplinary action, the parents of a student

---

[43] Park, *supra* note 5, at 152.

[44] The Special Education Elementary Longitudinal Study funded by the Office of Special Education Programs (OSEP) in the U.S. Department of Education. Data available at: http://old.nichcy.org/pubs/research/rb2txt.htm (last visited Mar. 17, 2009).

between the ages of 3 and 21 can request a due process hearing conducted by an ALJ.

In California, for example, the Office of Administrative Hearings (OAH) administers IDEA's procedural safeguards.[45] OAH provides an ALJ who hears evidence presented both by the parents and by the school district at the due process hearing.

In spite of these procedural protections, a parent cannot easily challenge a district when it fails to identify a child, denies special education eligibility, or denies the child FAPE. In addition, for low-income families, there are even greater obstacles, such as language barriers, financial constraints, literacy issues, disability and greater fear of retaliation.

For example, parents attempting to navigate the dispute resolution process in California receive a 62-page OAH manual (*id.*), which currently is available only in English. This obviously places non-English speakers and those for whom English is a second language at a distinct disadvantage, because they may not understand the 62-page document that attempts to explain the hearing process. The manual also is not accessible to some parents with disabilities, particularly those with cognitive disabilities. *See* Disability Rights Law Center's Comments to

---

[45] *A Parents Guide: Understanding the Special Education Hearing Process at the Office of Administrative Hearings*, Second Draft, available at http://www.documents.dgs.ca.gov/oah/SE/SE%20PARENT%20MANUAL%20Second%20Draft%20To%20Website%200122109.pdf

OAH's Draft Parent Manual, December 1, 2008, at 2.[46] Similarly, the actual hearing process as set forth in the manual also is not accessible to some parents with disabilities. For example, a hearing may be too far away for the parents to attend, or too lengthy in light of a parent's physical or mental disabilities, or it may fail to provide a sign language interpreter for a deaf parent. *Id.* at 1-2.

Attorney representation is not required at the hearing, but many, if not most, parents may be too intimidated or confused to face the process without the assistance of counsel. This is particularly true because school districts regularly are represented by counsel in these proceedings, even where the parent is proceeding *pro se*.[47] Many parents, particularly those who have limited or no financial resources, are unable to retain counsel to represent them. Although some legal services organizations provide free representation to low-income families in special education cases, these resources are very limited and thus, cannot fulfill the very high demand for such representation.[48]

---

[46] Available at: http://www.disabilityrightslegalcenter.org/about/educationadvocacy.cfm.

[47] *See e.g.*, California Special Education Division Quarterly Report, Fourth Quarter 2007/2008 Fiscal Year, http://www.documents.dgs.ca.gov/oah/forms/2008/2007-08%20Fourth%20Quarter%20Report.pdf (27.8% of California IDEA cases in one quarter were filed by parents without counsel).

[48] Nancy Lee Jones & Ann Lordman, *The Individuals with Disabilities Act: Final Part B Regulations*, Cong. Res. Service 3 (Dec. 11, 2008) (citing Perry A. Zirkel, *Lay Advocates and*

To further exacerbate the problem, as a result of new IDEA regulations effective in December of 2008, parents now may not be represented in a due process hearing by an advocate who is not an attorney unless such representation is specifically allowed for by State law.[49] A 2006 study found that only 12 States affirmatively allowed for the use of non-attorney advocates.[50]

Further, if parents want an expert to provide support (such as explaining why the assessment results indicate the child is eligible for special education services), the parents are responsible for shouldering that expense too, as such costs are not reimbursable to a parent who successfully challenges a school district in a due process hearing. *Arlington v. Murphy*, 548 U.S. 291, 126 S.Ct. 2455, 165 L.Ed.2d 5266 (2006). This is often an impossible barrier for a family with little or no financial resources. This problem is further compounded by the fact that (as discussed more fully below) a parent who challenges the district's denial has the burden of proof and thus, expert testimony is likely to be crucial to the success of the parent at a due process hearing.

Low-income parents of children with

Parent Experts under the IDEA, 217 Ed. Law. Rep. 19 (May 3, 2007) (noting the shortage of available attorneys to represent parents at due process hearings)).

[49] 34 C.F.R. § 300.512(a)(1), 73 FED. REG. 73017 (Dec. 1, 2008); Nancy Lee Jones & Ann Lordeman, *The Individuals with Disabilities Act: Final Part B Regulations*, Cong. Res. Service 3-4 (Dec. 11, 2008).

[50] *Id.* at 3 (citing Zirkel, *supra* note 48).

disabilities also lack an option that more affluent parents may choose when facing a similar situation. While parents in more comfortable financial circumstances can transfer their child to a private school while the dispute resolution process plays out, parents of limited means are forced to sit by while their child languishes in a public school that refuses to recognize and provide educational services that are appropriate to the child's disability.

Parents of children with disabilities face procedural as well as fiscal obstacles. In *Schaffer v. Weast*, this Court held that the burden of proof in an administrative proceeding lies with the party seeking relief. 546 U.S. 49, 57-58, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). This burden may be shifted by operation of state law (*id.* at 57), but unless it is, the parents of the child with a disability must prove that their child is deserving of special education services if their child's assessment has resulted in denial of such services. For low-income parents especially, this adds to the already onerous burden on their shoulders.

Parents also may experience psychological difficulties with contesting a decision that their child does not deserve special education. Not only is such an administrative hearing likely to be a daunting experience, particularly for people unaccustomed to dealing with bureaucracies, but it requires the parents to insist that their child has special needs. Understandably, few parents want to admit that their child has a disability. This makes the school district's role in identifying

students with disabilities even more critical.

According to a Roper Starch poll conducted in 2000, 44% of parents who noticed their child exhibiting signs of difficulty with learning waited a year or more before acknowledging their child might have a serious problem.[51] Whether due to cultural factors, lack of understanding, or simple denial, parents do not effectively identify children who require special education services. Petitioner's interpretation of IDEA would transfer significant identification responsibility to parents by incentivizing school districts to not identify students whose disabilities might require private education. Thus, that interpretation is counter-productive and harmful, and will result in fewer children with disabilities receiving special education services. This result would undermine the intent of Congress and the goal of educating our country's special needs children.

V. Children With Disabilities Would Be Harmed By Creating A Substantial Disincentive For School Districts To Find Them Promptly And Identify, Assess, And Provide Services For Their Disabilities Under IDEA.

By delaying identification of children with disabilities, school districts can avoid or delay the costs of developing IEPs and providing special education for many children, and also can delay or avoid altogether paying reimbursement for

---

[51] Roper Starch Worldwide, *Measuring Progress in Public and Parental Understanding of Learning Disabilities* (2000).

private placement of those who cannot be served appropriately in the public schools.

As the Ninth Circuit noted below, a categorical bar against reimbursement for private school expenses to students who have not yet received special education is nonsensical:

> [it] would lead to the *absurd result* that the parents of a child with a disability must wait (*an indefinite, perhaps lengthy period*) until the child has received special education in public school before sending the child to an appropriate private school, no matter how uncooperative the school district and no matter how inappropriate the special education.

Pet. App. 15a (emphasis added).

Experts agree that early identification and intervention is critically important in helping students with disabilities achieve academic success. "Without early intervention, the poor first-grade reader almost invariably becomes a poor middle school reader, high school reader, and adult reader. In short, children who get off to a poor start in reading rarely catch up. We wait—they fail."[52] Absent early identification, "children's reading difficulties grow stronger roots, and possibly become more intractable. For the most effective intervention, schools must find

---

[52] G. Reid Lyon, *et al.*, *Rethinking Learning Disabilities*, *in Rethinking Special Education for a New Century*, 259, 270 (Chester Finn & Charles Hokanson eds., 2001).

ways to identify these children much earlier than they usually do."[53] Without early identification of students with mathematical disabilities, those students "may not develop a level of mathematics proficiency that is sufficient for success on high-stakes assessment administered in the early grades."[54] The earlier the identification and intervention, the less likely the student is to need intensive special education services as an older child or adolescent.[55] Delaying identification would thus cause irreparable harm to children with learning disabilities.

Indeed, Congress has long acknowledged the importance of early identification of children's disabilities. Provisions for Early and Periodic Screening, Diagnostic and Treatment (EPSDT) services were added to the Medicaid Act in 1967. EPSDT facilitates early detection of health conditions and entitles children to preventative care and treatment. 42 U.S.C. § 1396d(r). When introducing EPSDT, President Lyndon B. Johnson stated, "The problem is to discover, as early as possible, the ills that handicap our children." 90th Cong., 1st Sess. (1967).

---

[53] Joseph R. Jenkins, *Early Identification and Intervention for Young Children with Reading/Learning Disabilities*, available at http://www.nrcld.org/resources/ldsummit/jenkins.pdf (2001).

[54] Diane Pedrotty Bryant, *Commentary on Early Identification and Intervention for Students with Mathematics Difficulties*, 38 J. Learning Disabilities 340 (2005).

[55] Lyon, *et al.*, *supra* note 52, at 276.

More importantly, IDEA's Child Find mandate plainly demonstrates Congress's intent to ensure early identification of children with disabilities specifically so they can receive appropriate education from the outset. An interpretation of IDEA that would encourage school districts to do exactly the opposite—by telling them that they do not have to pay for a child's necessary private educational placement even after they fail or refuse to identify the child's special needs—cannot be a correct construction of the law.[56]

VI. As This Case Shows, School Districts May Blame Substance Abuse For Academic Problems To Avoid Acknowledging That Some Students Need Special Education Because Of Learning Disabilities Or Other Health Impairments.

Forest Grove School District's decision to deny that T.A. was eligible for special education services and to refuse to reimburse his parents for private tuition was based in part on his use of marijuana. The district blamed his drug use for

---

[56] Petitioner invokes the presumption that public school officials have properly performed their duties under IDEA, in a vain effort to counter the Ninth's Circuit's recognition of the perverse incentive that would be created by petitioner's interpretation of the law. (*See* Brief of Petitioner at 39-40.) But such a presumption cannot categorically preclude determinations in particular cases that school district personnel failed to fulfill their IDEA obligations—especially in light of the critical importance of early identification of, and provision of appropriate educational services to, children with disabilities.

his academic difficulties and for his parents' decision to place him in private school, rather than acknowledging that his drug use might well be the result of his learning problems instead of the cause. Numerous studies confirm that students with learning disabilities and/or AD/HD are more likely to use drugs than students without learning disabilities.[57] In fact, the presence or absence of a learning disability was a better predictor of chemical dependency than gender, ethnicity, age, socioeconomic status, or family composition.[58]

One study found that marijuana use was "significantly higher" among adolescents with learning disabilities.[59] Another study found that children with AD/HD are four times more likely to

---

[57] *See, e.g.*, Oscar Bukstein, *Substance Abuse in Patients with Attention-Deficit/Hyperactivity Disorder*, 10 Medscape J. 24 (2008); Brooke S. G. Molina & William E. Pelham, *Substance Use, Substance Abuse, and LD Among Adolescents with a Childhood History of AD/HD*, 34 J. Learning Disabilities 333 (2001); Frances R. Levin & Herbert D. Kieber, *Attention-Deficit Hyperactivity Disorder and Substance Abuse: Relationships and Implications for Treatment*, 2 Harv. Rev. Psychiatry 246 (1995); Jeffrey J. Wilson & Frances Levin, *Attention-Deficit/Hyperactivity Disorder and Early-Onset Substance Abuse Disorders*, 15 J. Child & Adolescent Psychopharmacology 751 (2005); John W. Maag, *et al.*, *Prevalence and Predictors of Substance Use: A Comparison Between Adolescents With and Without Learning Disabilities*, 27 J. Learning Disabilities 223 (1994); Demetra D. Karacostas & Gary L. Fisher, *Chemical Dependency in Students With and Without Learning Disabilities*, 26 J. Learning Disabilities 491 (1993).

[58] *See* Karacostas & Fisher, *supra* note 57.

[59] Maag, *et al.*, *supra* note 57.

develop a substance abuse disorder by adulthood.[60] Children whose AD/HD persists into adulthood have a 50% lifetime risk for developing a substance abuse disorder.[61] Adolescents with AD/HD are also likely to develop a substance abuse disorder at a significantly younger age than those without AD/HD.[62]

Importantly, "[i]n all reported longitudinal studies, the onset of AD/HD *precedes* that of SUD [substance abuse disorder] . . . ."[63] The scientific data supports the theory that students with learning disabilities and/or AD/HD, especially when untreated, are more likely to use drugs due to frustration and low self-esteem resulting from poor academic performance.

Because students with learning disabilities and/or AD/HD are significantly more likely than others to develop substance abuse problems, it is unconscionable to blame substance abuse for the academic problems of a student with a disability, and deny appropriate special education on that basis. School districts cannot avoid their

---

[60] Salvatore Mannuzza & Rachel G. Klein, *Long-Term Prognosis in Attention-Deficit/Hyperactivity Disorder*, 9 Child Adolescent Psychiatric Clinics N. Am. 711 (2000).

[61] Bukstein, *supra* note 57.

[62] *See* Timothy E. Wilens, *et al.*, *Attention Deficit Hyperactivity Disorder (AD/HD) Is Associated with Early Onset Substance Use Disorders*, 185 J. Nervous & Mental Disease 475 (1997); Himanshu P. Upadhyaya, *Managing Attention-Deficit/Hyper-activity Disorder in the Presence of Substance Use Disorder*, 68 J. Clin. Psychiatry 23 (2007).

[63] Bukstein, *supra* note 58 (emphasis added).

responsibility to provide special education by misidentifying the problem. IDEA requires that local school districts provide all eligible students with a free, appropriate public education, and it would severely undermine both the express mandates and the fundamental purposes of IDEA to deny special education to those students who have developed secondary problems due to their underlying disabilities.

CONCLUSION

To fulfill Congress's commitment to provide a FAPE for every eligible child with a disability, school districts sometimes must fund private education—including in some cases where children with disabilities have not previously received special education services from their public school districts because the districts failed or refused to recognize and meet their IDEA obligations. The Ninth Circuit properly rejected the argument that school districts never can be required to pay for private education except for children who previously received public special education services. Instead, the Ninth Circuit correctly held that is not the law, and this Court should affirm that decision—for the benefit of children with disabilities, their families, their communities, and our nation as a whole.

Respectfully submitted,

Paula D. Pearlman
Deborah A Dorfman
DISABILITY RIGHTS
LEGAL CENTER
919 Albany Street
Los Angeles, CA 90015
(213) 736-1195

Terri D. Keville
(*Counsel of Record*)
Hal W. Gibson
Lisa J. Kohn
DAVIS WRIGHT
TREMAINE LLP
865 South Figueroa
Street, Suite 2400
Los Angeles, CA 90017
(213) 633-6800

AMICUS CURIAE BRIEF

No. 08-305

In The Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,

Petitioner,

v.

T.A.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL DISABILITY RIGHTS NETWORK, THE PROTECTION AND ADVOCACY AGENCIES OF ALASKA, ARIZONA, CALIFORNIA, IDAHO, MONTANA, NEVADA, THE NORTHERN MARIANA ISLANDS, OREGON, AND WASHINGTON, NEW YORK LAWYERS FOR THE PUBLIC INTEREST, AND ADVOCATES FOR CHILDREN OF NEW YORK AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

BRIAN R. MATSUI
SETH M. GALANTER
Counsel of Record
LINDA A. ARNSBARGER
MARC A. HEARRON
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-1500

CARL H. LOEWENSON, JR.
MORRISON & FOERSTER LLP
1290 Avenue of the Americas
New York, N.Y. 10104

Counsel for Amici Curiae

APRIL 1, 2009

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 6

ARGUMENT 10

SECTION 1412(a)(10)(C) OF THE IDEA DOES NOT RESTRICT JUDICIAL AUTHORITY TO AWARD REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT, AND SUCH RELIEF IS CRITICAL TO PARENTS WHOSE CHILDREN ARE BEING DENIED THE FREE APPROPRIATE PUBLIC EDUCATION THAT THE IDEA GUARANTEES 10

A. Unilateral Private School Placement Is Rare, But When It Occurs, The Equitable Remedy Of Reimbursement Is Often Critical To Secure The Child An Appropriate Education 12

1. The incidence of due process complaints seeking reimbursement for private placement is extremely small 12

2. Private placement costs generally are not significantly greater than public special education costs for comparable services 18

3. Private placement costs fall only on school districts that do not provide the appropriate public education required by federal law 24

TABLE OF CONTENTS – Continued

Page

B. Congress Did Not Clearly Manifest An Intent To Prohibit Courts From Ordering Reimbursement When A School District Violates Federal Law 27

1. Congress has not altered the statutory provisions that this Court correctly interpreted in *Burlington* and *Carter* to authorize courts to order reimbursement when federal law has been violated 30

2. Petitioner's reading of Section 1412(a)(10)(C) is contrary to its legislative history 32

3. Congress has ratified the Secretary of Education's repeated interpretation of the IDEA as granting authority to award reimbursement for private placement even where the child had not previously received special education under the authority of a public agency 38

CONCLUSION 40

TABLE OF AUTHORITIES

Page

CASES:

Board of Education v. Rowley, 458 U.S. 176 (1982) 10

Board of Education of City School District of New York v. Tom F., 193 Fed. Appx. 26 (2d Cir. 1006), *aff'd per curiam by an equally divided Court*, 128 S. Ct. 17 (2007) 6

Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986) 39

Connors v. Mills, 34 F. Supp. 2d 795 (N.D.N.Y. 1998) 19

Draper v. Atlanta Independent School System, 518 F.3d 1275 (11th Cir. 2008) 19

Florence County School District v. Carter, 510 U.S. 7 (1993) ..... *passim*

Frank G. v. Board of Education, 459 F.3d 356 (2d Cir. 2006), *cert. denied*, 128 S. Ct. 436 (2007) 25, 26

Hutto v. Finney, 437 U.S. 678 (1978) 29

Lorillard v. Pons, 434 U.S. 575 (1978) 39

Schaffer v. Weast, 546 U.S. 49 (2005) 25

School Committee of the Town of Burlington v. Department of Education, 471 U.S. 359 (1985) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

U.S. CONSTITUTION, STATUTES & REGULATIONS:

U.S. Const. art. I, § 8, cl. 1 (Spending Clause) 29

U.S. Const. amend. XIV 29

Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*:

§ 1400(d)(1) 30

§ 1412(a)(10)(B) 14

§ 1412(a)(10)(C) ..... *passim*

§ 1412(a)(10)(C)(ii) 38, 39

§ 1414(d) 11

§ 1415(i)(2)(C)(iii) ..... *passim*

§ 1415(f)(3)(E)(ii) 25

Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004) 39

Or. Rev. Stat. § 327.348 24

64 Fed. Reg. 12,406 (Mar. 12, 1999) 39

65 Fed. Reg. 9178 (Feb. 23, 2000) 39

LEGISLATIVE MATERIALS:

143 Cong. Rec. S4299 (daily ed. May 12, 1997) 33

143 Cong. Rec. H2536 (daily ed. May 13, 1997) 33

TABLE OF AUTHORITIES – Continued

Page

Hearing on the Reauthorization of the Individuals with Disabilities Education Act: Before the Subcomm. on Select Educ. & Civil Rights of the House Comm. on Educ. and Labor, 103d Cong. (1994) 35

Hearings on the Individuals with Disabilities Education Act: Before the Subcomm. on Early Childhood, Youth & Families of the House Comm. on Economic and Educational Opportunities, 104th Cong. (1995) 35

Hearing on Early Childhood, Youth & Families Staff Draft of the IDEA Improvement Act: Before the Subcomm. on Early Childhood, Youth & Families of the House Comm. on Economic and Educational Opportunities, 104th Cong. (1996) 36

Hearings on H.R. 5, The IDEA Improvement Act of 1997: Before the Subcomm. on Early Childhood, Youth & Families of the House Comm. on Educ. & the Workforce, 105th Cong. (1997) 37

Reauthorization of the Individuals with Disabilities Education Act: Before the Senate Comm. on Labor & Human Resources, 105th Cong. (1997) 37

H.R. Rep. No. 104-614 (1996) 36, 37

H.R. Rep. No. 105-95 (1997) 38

S. Rep. No. 105-17 (1997) 38

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

ASAH, *The Full Cost to New Jersey's Taxpayers for Self-Contained Special Education Programs: A Comparative Analysis of Local Public, County-based, and Private Special Education Programs* (Nov. 2007) 21

Boston Public School Tuition Survey (2009) 17, 18

Jay G. Chambers *et al.*, Special Education Expenditure Project, Center for Special Education Finance, *Total Expenditures for Students with Disabilities, 1999-2000: Spending Variation by Disability, Report 5* (June 2003).....22

Jay G. Chambers *et al.*, Special Education Expenditure Project, Center for Special Education Finance, *Characteristics of High-Expenditure Students With Disabilities, 1999-2000, Report 8* (May 2004).....22

General Accounting Office, *Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts* (GAO-03-897) (2003) 16

Los Angeles Unified School District Tuition Survey (2009) 17, 23

Thomas Mayes & Perry Zirkel, *Special Education Tuition Reimbursement Claims: An Empirical Analysis,* 22 Remedial and Special Education 350 (2001) 16

TABLE OF AUTHORITIES – Continued

Page

National Council on Disability, *Serving the Nation's Students with Disabilities: Progress and Prospects* (Mar. 4, 1993) 27

National Council on Disability, *Back to School on Civil Rights: Advancing the Federal Commitment to Leave No Child Behind* (Jan. 25, 2000) 26, 28

New York City Department of Education, *School Based Expenditure Reports School Year 2004-2005* 23

New York City Department of Education, *School Based Expenditure Reports School Year 2005-2006* 23

New York City Department of Education Tuition Survey (2007) 23

New York State Comptroller, *Waiting for Special Education*, Report No. 3-2009 (June 2008) 26

New York State Office of Vocational and Educational Services for Individuals with Disabilities, *New York State Part B Annual Performance Report* (2003-2004) 17

Thomas B. Parrish & Jenifer J. Harr, American Institutes for Research, *Special Education Funding In Oregon: An Assessment of Current Practice with Preliminary Recommendations* (Aug. 7, 2007) 23

TABLE OF AUTHORITIES – Continued

Page

Ellen Schiller *et al.*, Abt Associates, Inc., *Marking the Progress of IDEA Implementation* (April 2006) 16

Judy Schrag & Howard Schrag, National Association of State Directors of Special Education, *National Dispute Resolution Use and Effectiveness Study* (September 2004) 15, 20

U.S. Department of Education, *Data Tables for State OSEP Data, IDEA Part B Dispute Resolution* (2006-2007) 16

U.S. Department of Education, *Data Tables for State OSEP Data, IDEA Part B Educational Environment* (Fall 2005) 13, 20

U.S. Department of Education, *Data Tables for State OSEP Data, IDEA Part B Educational Environment* (Fall 2006) 13, 14

U.S. Department of Education, *Data Tables for State OSEP Data, IDEA Part B Educational Environment* (Fall 2007) 13, 14

U.S. Department of Education, *Nineteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (1997) 13

U.S. Department of Education, *Twentieth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (1998) 13

TABLE OF AUTHORITIES – Continued

Page

Mary Wagner *et al.*, *Special Education Elementary Longitudinal Study (SEELS): The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households* (2002) 19

BRIEF OF THE NATIONAL DISABILITY RIGHTS NETWORK, THE PROTECTION AND ADVOCACY AGENCIES OF ALASKA, ARIZONA, CALIFORNIA, IDAHO, MONTANA, NEVADA, THE NORTHERN MARIANA ISLANDS, OREGON, AND WASHINGTON, NEW YORK LAWYERS FOR THE PUBLIC INTEREST, AND ADVOCATES FOR CHILDREN OF NEW YORK AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

The National Disability Rights Network, the protection and advocacy agencies of the Ninth Circuit States of Alaska, Arizona, California, Idaho, Montana, Nevada, the Commonwealth of the Northern Mariana Islands, Oregon, and Washington, New York Lawyers for the Public Interest, and Advocates for Children of New York respectfully submit this brief as *amici curiae* in support of respondent.

INTEREST OF *AMICI CURIAE*[1]

This case is of particular interest to *amici curiae*, who advocate on behalf of children with disabilities to ensure that they receive the free appropriate public

---

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court, pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

education they are guaranteed under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*

Amicus National Disability Rights Network, formerly the National Association of Protection and Advocacy Systems, is the membership association of protection and advocacy (P&A) agencies that are located in all 50 States, the District of Columbia, Puerto Rico, and the territories. P&As are authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings.

The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. P&A lawyers often represent or assist parents of children with disabilities in the impartial due process hearings authorized under the IDEA and know first-hand that often school districts do not provide appropriate special education and related services, forcing parents to make unilateral placement decisions.

Virtually all of the P&As that work in the States within the Ninth Circuit, as well as the Commonwealth of the Northern Mariana Islands, have joined this brief because of the need for strong remedies to redress violations of the IDEA.

Disability Law Center of Alaska (DLCA) is an independent non-profit law firm providing legal

advocacy services for people with disabilities anywhere in Alaska. DLCA is designated as the State of Alaska's P&A agency, and as such, its mission includes ensuring that children with disabilities in Alaska receive the free appropriate public education to which they are entitled under the IDEA.

The Arizona Center for Disability Law (ACDL) is the federally funded P&A for the State of Arizona. ACDL is authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings throughout Arizona. The ACDL received approximately 829 service requests in special education for fiscal year 2008.

Disability Rights California (DRC) is the State of California's designated protection and advocacy agency for people with disabilities. DRC provides counsel and direct representation in administrative and court proceedings to individuals with all categories of disability (including physical, sensory, cognitive, and psychiatric) in many substantive areas, including rights under the IDEA.

Comprehensive Advocacy, Inc. (Co-Ad) is the State of Idaho's P&A system. Since 1976, Co-Ad has received federal grants to advocate on behalf of children with disabilities to ensure that they receive the free appropriate education they are guaranteed under the IDEA. Co-Ad receives numerous requests annually from parents of children attending Idaho's

public schools to assist them with obtaining the special education and related services their children are entitled to under the IDEA. Co-Ad provides free legal services to the families of children with disabilities and assists the families by providing information on their rights, negotiating at school meetings, and representing the child at mediation proceedings or more formal hearings, if necessary.

Disability Rights Montana (DRM) is the federally funded P&A for the state of Montana. DRM is authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings throughout Montana. DRM received approximately 108 service requests in special education for fiscal year 2008.

Nevada Disability Advocacy & Law Center (NDALC) is a private, nonprofit organization and serves as Nevada's federally mandated P&A system for the human, legal, and service rights of children with disabilities. NDALC was designated as Nevada's P&A system by the Governor in March 1995. NDALC's mission includes protecting and advocating for the human and legal rights of children with disabilities, and NDALC's agency priorities include advocating for children in Nevada's school systems.

Northern Marianas Protection and Advocacy System, Inc. (NMPASI) is a non-profit organization that was established in 1993 as the P&A agency for the Commonwealth of the Northern Mariana Islands.

NMPASI's primary function is to protect the rights of individuals with disabilities through legally based advocacy and support.

Disability Rights Oregon (DRO) is a federally funded law office charged with protecting the rights of people with disabilities. One of DRO's primary goals and priorities is ensuring that Oregonians with disabilities receive a free and appropriate education. DRO devotes two attorneys, an advocate, and an intake worker to address the needs of children who need specialized services to succeed in school.

Disability Rights Washington (DRW) is designated by federal law and the Governor of Washington to provide protection and advocacy services for people in Washington with physical, sensory, and mental disabilities. DRW is federally mandated to advocate for the rights of people with disabilities in Washington, including children in educational settings.

In addition to the above P&As from the Ninth Circuit, the issue addressed in this case is also of particular interest to organizations based in New York.

New York Lawyers for the Public Interest (NYLPI) is one of New York's federally funded P&A agencies. Founded in 1976 as a partnership between the public and private bars to assist disadvantaged and underrepresented people in New York City, NYLPI conducts advocacy and litigation concerning disability rights, access to health care, and

environmental justice. Through its Disability Law Center, NYLPI has a long history of advocacy for children with disabilities on educational issues. NYLPI filed an *amicus* brief in the Second Circuit court of appeals and in this Court jointly with the NDRN in *Board of Education of City School District of New York v. Tom F.*, 193 Fed. Appx. 26 (2d Cir. 2006), *aff'd per curiam by an equally divided Court*, 128 S. Ct. 17 (2007).

Advocates for Children of New York (AFC) is dedicated to ensuring access to the best education New York City can provide for all students. For over 37 years, AFC has been working with low-income families in New York City to secure quality and equal public education services for their children. AFC provides a range of direct services, including free individual case advocacy, technical assistance, and training, and also works on institutional reform of educational policies and practices through advocacy and litigation. One of AFC's primary activities is providing free legal representation to low-income parents of students with disabilities at due process proceedings under the IDEA to ensure that their children receive the free appropriate public education to which they are entitled.

SUMMARY OF ARGUMENT

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, requires that a State (and its school districts) that accepts federal IDEA

funds provide to each child with a disability a free appropriate public education tailored to accommodate the child's disability and to achieve educational benefit. If a school district violates this statutory mandate, a court may, after exhaustion of administrative procedures, "grant such relief as the court determines is appropriate" for violations of the statute. 20 U.S.C. § 1415(i)(2)(C)(iii). This broad grant of remedial authority has twice been interpreted by this Court to authorize a court to order a school district to reimburse parents for their reasonable expenditures on private special education for a child if the court ultimately determines that such placement, rather than the school district's proposal, is proper under the IDEA. *See School Comm. of the Town of Burlington v. Department of Educ.*, 471 U.S. 359 (1985); *Florence County Sch. Dist. v. Carter*, 510 U.S. 7 (1993). Congress has not repealed that equitable authority.

A. 1. Contrary to the overstated rhetoric of petitioner and its *amici*, a ruling in favor of the parent in this case should not impose a significant burden on school districts. Fewer than 1.5% of children with disabilities have been placed in private school over the past two decades in order to receive an appropriate special education and related services. Most of those children are placed in private schools with the consent of the public school district and do not implicate the reimbursement remedy at issue in this case. Unilateral placement of children with disabilities in private schools by their parents

because of a public school's failure to offer the appropriate education required by federal law constitutes some very small part of that already narrow slice of children in private placements.

2. The IDEA benefits predominantly lower-income children with disabilities, and the children who are most likely to be placed in private schools are those with less-common disabilities. Moreover, the cost of private placement is not significantly greater and can actually be less than that spent in public school.

3. Petitioner and its *amici* gloss over the fact that the decisions by hearing officers and judges to reimburse parents of children with disabilities placed in private school must be based on findings that public school systems did not comply with the IDEA because they did not offer an appropriate education for the children. Compliance and monitoring reports by the United States Department of Education have revealed that in many localities, school districts are not in compliance with federal law. The myriad cases in which federal and state courts have made similar findings confirms this fact.

B. Congress made clear in the text of the statute, in the legislative history, and in its subsequent 2004 re-enactment of the IDEA that it did not intend to categorically deny the equitable remedy of reimbursement to those relatively few children with disabilities who must be placed in private school in order to receive a free appropriate education simply because they had not previously received

special education under the authority of a public agency.

1. In *Burlington* and again in *Carter*, this Court held that the IDEA authorizes courts to order reimbursement of reasonable private school tuition if a school district is not offering an education appropriate for a child with disabilities. Contrary to petitioner's argument, 20 U.S.C. § 1412(a)(10)(C), first enacted in 1997, did not create a new categorical limitation on the remedies available for violations of the IDEA. This Court had relied in those leading opinions on two statutory provisions in the IDEA to determine that courts can award tuition reimbursement, and Congress has not altered either of them (save for changes in terminology).

2. Nothing in the legislative history suggests that Congress intended to categorically exclude from the equitable remedy of reimbursement children with disabilities who never received special education under the authority of a public agency if the parents can establish that the school district is not offering an appropriate public education. To the contrary, to the extent this issue was discussed at all, the legislative history confirms that Section 1412(a)(10)(C) was intended to codify the prevailing case law that notice to the school district of an intent to place a child in private school because of dissatisfaction with the proposed IEP is a relevant factor for a court to consider in exercising its remedial discretion.

3. Since 1997, the Secretary of Education has repeatedly interpreted Section 1412(a)(10)(C) of the IDEA as not abrogating courts' authority to award reimbursement for private placement under Section 1415(i)(2)(C)(iii), even when the child has not previously received special education from a public agency. Congress ratified that interpretation by re-enacting Sections 1412(a)(10)(C) and 1415(i)(2)(C)(iii) without change in 2004.

ARGUMENT

SECTION 1412(a)(10)(C) OF THE IDEA DOES NOT RESTRICT JUDICIAL AUTHORITY TO AWARD REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT, AND SUCH RELIEF IS CRITICAL TO PARENTS WHOSE CHILDREN ARE BEING DENIED THE FREE APPROPRIATE PUBLIC EDUCATION THAT THE IDEA GUARANTEES

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, requires that a State (and its school districts) that accepts federal IDEA funds provide each child with a disability with a free appropriate public education tailored to accommodate the child's disabilities and to achieve educational benefit. *See Board of Educ. v. Rowley*, 458 U.S. 176, 209 (1982).[2] If a school district violates this statutory

[2] The free appropriate public education is supposed to be reflected in the particular child's "IEP," the Individualized Education Program developed by a team of teachers, parents, and school administrators to, among other things, describe the

(Continued on following page)

mandate, a court may, after exhaustion of administrative procedures, "grant such relief as the court determines is appropriate" for violations of the statute. 20 U.S.C. § 1415(i)(2)(C)(iii). This broad grant of remedial authority has twice been interpreted by this Court to authorize a court or hearing officer to order school districts to reimburse parents for their reasonable expenditures on unilateral private special education for a child if the court or hearing officer ultimately determines that such placement, rather than a proposed IEP with a public school placement, is proper under the Act. *See School Comm. of the Town of Burlington v. Department of Educ.*, 471 U.S. 359 (1985); *Florence County Sch. Dist. v. Carter*, 510 U.S. 7 (1993).

This equitable authority is rarely invoked, but it is an essential remedy for ensuring that children with disabilities receive timely and appropriate educational services when faced with intransigence or mismanagement by school districts. Contrary to petitioner's argument, 20 U.S.C. § 1412(a)(10)(C), first enacted in 1997, did not impose a categorical limitation on the remedies available for violations of the IDEA.

---

regular education, special education and related services, and other accommodations necessary to provide a student with an appropriate education. 20 U.S.C. § 1414(d).

A. Unilateral Private School Placement Is Rare, But When It Occurs, The Equitable Remedy Of Reimbursement Is Often Critical To Secure The Child An Appropriate Education

Contrary to the overstated rhetoric of petitioner and its *amici*, a ruling in favor of the parent in this case should not pose a significant burden on school districts. By contrast, a ruling in favor of petitioner would eliminate the only form of relief that can provide redress to parents who correctly act on the fact that a school district refuses to acknowledge their child has a disability *or* proposes an educational program for their child that would not constitute an appropriate education for the child.

1. The incidence of due process complaints seeking reimbursement for private placement is extremely small

Anecdotal stories that allege a trend of soaring private school placements for children with disabilities should not be confused with the facts. The United States Department of Education has tracked private placements for several decades. From a quantitative standpoint, the number of children with disabilities who are placed in private school is low, and such placement by parents without the concurrence of the school district is extremely small.

A school system in Oregon, just as anywhere else in the country, faces an order of involuntary

reimbursement of tuition for a child with disabilities in a private placement under Section 1415(i)(2)(C)(iii) only if a due process hearing and any subsequent litigation determines that the public school could not provide the child an appropriate education.

The percentage of children receiving services under the IDEA in publicly funded private placements has not changed significantly over the last 23 years. Since 1985, an average of 1.44% of all children served each year under the IDEA were in private placements at public expense.[3] For the past two years for which national data are available, in 2006 only 0.97% of children with disabilities were in private placements at public expense (57,078 out of 5,888,227 children), and in 2007 the percentage was

---

[3] U.S. Dep't of Educ., *Data Tables for State Office of Special Education Programs ("OSEP") Data, IDEA Part B Educational Environment*, Table 2-2 (Fall 2007) (hereinafter "2007 OSEP Educational Environment Data Table 2-2"), *available at* https://www.ideadata.org/tables31st/ar_2-2.htm; U.S. Dep't of Educ., *Data Tables for State OSEP Data, IDEA Part B Educational Environment*, Table 2-2 (Fall 2006) (hereinafter "2006 OSEP Educational Environment Data Table 2-2"), *available at* https://www.ideadata.org/tables30th/ar_2-2.htm; U.S. Dep't of Educ., *Data Tables for State OSEP Data, IDEA Part B Educational Environment*, Table 2-5 (1996 through 2005) (Fall 2005), *available at* https://www.ideadata.org/tables29th/ar_2-5. htm; U.S. Dep't of Educ., *Twentieth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act*, at A-156 (1998) (Table AB7, 1986-1996, age group 6-21); U.S. Dep't of Educ., *Nineteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act*, at A-156 (1997) (Table AB7, 1985-1986, age group 6-21).

only 1.13% of children (66,648 children out of 5,882,835 children).[4]

The majority of these private placements are "agreed placements," meaning that the school district and parents agree that the private placement is necessary to provide the child with an appropriate education. *See* 20 U.S.C. § 1412(a)(10)(B) (discussing children with disabilities who "are placed in, or referred to" private schools "by the State or appropriate local educational agency as the means of carrying out the requirements of" the IDEA); *Amicus* Br. of Nat'l Sch. Bd. Ass'n, at 14 (acknowledging that the "overwhelming majority of these [private] placements were ones that school districts agreed were appropriate to ensure the child in question received the education mandated by IDEA"). Some of these agreements take place at the IEP meeting, while others are not reached until the parents file a request for a due process hearing and the parties reach a settlement agreement that the school district will reimburse the tuition expended by the parents.

Amici are not aware of a study that reports how many of these private placements were unilateral parent placements for which the school district has been ordered by a hearing officer or court to pay reimbursement. But an examination of the data regarding dispute resolution under the

---

[4] 2007 OSEP Educational Environment Data Table 2-2; 2006 OSEP Educational Environment Data Table 2-2.

IDEA demonstrates that the actual number of reimbursement cases is very small. And the number that would be affected by petitioner's proposed rule would be even smaller.

It is rare for parent-school disputes to reach a due process hearing, much less reach a decision in the parents' favor awarding reimbursement. Starting with the broader universe that includes all requests for due process hearings or mediation under the IDEA as well as other formal complaints to state agencies regarding violation of the IDEA, there are an estimated 25,000 to 27,000 disputes filed annually, which represents approximately 0.4% of the approximately 6 million children with disabilities who are eligible under the IDEA. *See* Judy Schrag & Howard Schrag, National Association of State Directors of Special Education, *National Dispute Resolution Use and Effectiveness Study* 18, 24-25 (September 2004), *available at* http://www.direction service.org/cadre/effectiveness.cfm. Private placement was the key issue in only 3.5% of such disputes in 1999, 1.5% of such disputes in 2000, and 3.3% of such disputes in 2001. *Ibid.*

Of the requests for due process hearings, over 80% never are resolved on the merits; only 18.7% of due process hearings reach a decision. *Id.* at 29-30 (74.9% are withdrawn and 6.4% are dismissed). Nationwide, only approximately 3200 due process

hearings are held each year.[5] Parents prevail in only 29.8% of tuition reimbursement disputes that are resolved in a due process hearing or by a court. *See* Thomas Mayes & Perry Zirkel, *Special Education Tuition Reimbursement Claims: An Empirical Analysis*, 22 Remedial and Special Education 350, 355 (2001).

Due process hearings are concentrated in a small number of States—California, Maryland, New Jersey, New York, Pennsylvania and the District of Columbia—and, within those States, a small number of primarily urban school districts. *See* General Accounting Office, *Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts* (GAO-03-897) 13-14 (2003). In fact, 90% of school districts had no due process hearings at all in 2004-2005, and only 4% of school districts were involved in IDEA litigation of any kind. *See* Ellen Schiller *et al.*, Abt Associates, Inc., *Marking the Progress of IDEA Implementation* 19-20 (April 2006).

The Council of the Great City Schools is thus certainly correct when it notes in its *amicus* brief (at 26) that the volume of disputes involving tuition

---

[5] U.S. Dep't of Educ., *Data Tables for State OSEP Data, IDEA Part B Dispute Resolution*, Table 7-3 (2006-2007) (Number of hearings (fully adjudicated) through dispute resolution procedures for children ages 3 through 21 served under IDEA, Part B, by case status and state), *available at* https://www.ideadata.org/tables31st/ar_7-3.xls.

reimbursements in New York City, on which it relies to support its argument, is "unique." The State of New York held approximately one-third (1058) of the entire nation's due process hearings that proceeded to decision in 2004.[6] Yet, even then, only 102 of those due process decisions involved parent tuition reimbursement.[7] The Los Angeles Unified School District, by contrast, reported to the Council of Great City Schools that there were no due process or court decisions ordering payment of tuition for a private placement in 2006-2007, and one decision ordering payment of private school tuition in 2007-2008. *See* Los Angeles Unified Sch. Dist. Tuition Survey, at 2.[8] Similarly, Boston reported to the Council no due process or court decisions ordering payment of tuition for a private placement in 2006-2007 and 2007-2008. Boston Pub. Sch. Tuition Survey, at 2.

---

[6] *See* New York State Office of Vocational and Educational Services for Individuals with Disabilities, New York State Part B Annual Performance Report 2003-2004, Appendix 18.5 (Distribution of Issues for Decided Impartial Hearing Cases July 1, 2003—June 30, 2004 Displayed by Upstate and New York City) (hereinafter "New York State Part B Annual Performance Report 2003-2004"), *available at* http://www.vesid.nysed.gov/sedcar/apr/apr0304data/appeigt5.htm.

[7] New York State Part B Annual Performance Report 2003-2004, Appendix 18.5.

[8] In preparation for its *amicus* brief, the Council of Great City Schools sent its members a survey requesting information about school district's tuition payments to private schools. The Council cited the survey responses in its *amicus* brief (at 23-26) and provided them to *amici* upon request. *Amici* cite these surveys using the same format as the Council.

Further, there is no evidence that children who have not previously received special education and related services under the authority of a public agency are obtaining reimbursement in untoward numbers. In Boston, for example, there were 26 due process requests claiming tuition reimbursement for private school placement in 2007-2008, and the school district settled 25 of them, of which 2 involved situations where the students had not previously attended public school (a test that is not co-extensive with the statutory standard). *Ibid.*

2. Private placement costs generally are not significantly greater than public special education costs for comparable services

The IDEA benefits predominantly lower-income children with disabilities, and the children who are most likely to be placed in private schools are those with less common disabilities. Moreover, the cost of private placement is not significantly greater and can actually be less than that spent in public school.

a. The children who benefit most from the IDEA are, by and large, not the children of the wealthy. Rather the IDEA's guarantees benefit most those who cannot afford other educational choices—children who are not only disabled, but also disadvantaged in other ways. Overall, 68 percent of children with disabilities live in households with incomes less than $50,000, compared to only 53 percent of nondisabled

children. *See* Mary Wagner *et al.*, *Special Education Elementary Longitudinal Study (SEELS): The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households* 29 (2002).

Low and middle-income parents often make extreme financial sacrifices (such as obtaining second mortgages) to front the cost of private placement pending hoped-for reimbursement. Some private schools are willing to enroll a child with a disability whose parents cannot afford to pay, pending resolution of a challenge to the school district's placement. And federal courts have fashioned equitable relief in the form of prospective tuition payments payable directly to the private school when the parents demonstrate that the public school's program is not appropriate, that a private school can provide an appropriate program, and that the parents are financially unable to pay the cost of private education in advance. *See Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275 (11th Cir. 2008); *Connors v. Mills*, 34 F. Supp. 2d 795 (N.D.N.Y. 1998).

b. Private school placements at public expense are usually provided for children with the types of disabilities for which public schools have shown themselves least able to provide an appropriate education. Almost three-quarters (73%) of all private school placements are children classified as emotionally disturbed, having mental retardation,

multiply-disabled, or autistic.[9] This is so even though such children represent only 22% of all children served under the IDEA. These same children are also disproportionately more likely to request due process hearings. *See* Schrag, *National Dispute Resolution Use and Effectiveness Study*, *supra*, at 20-21.

By contrast, children with learning disabilities and speech/language disabilities account for only 15% of children in private placements, despite representing 70% of children served under the IDEA. This is not because these disabilities are trivial, as often portrayed in the popular press; to the contrary, they often constitute significant impediments to learning. Fortunately, however, school districts have more experience, and greater success, with these higher frequency disabilities. Of course, as noted below, non-compliance with the IDEA is rampant and thus it is disappointing, but not surprising, that school districts are on occasion not themselves able to provide an appropriate public education even for children with these more common disabilities, leaving parents no choice but to rely on private placements.

c. Whether in public school or private school, it often costs more to educate a child with a disability.

---

[9] Except as otherwise noted, the facts in this paragraph and the next paragraph are drawn from the U.S. Dep't of Education, *Data Tables for State OSEP Data, IDEA Part B Educational Environment*, Tables 1-3 and 2-5 (Fall 2005), *available at* https://www.ideadata.org/tables29th/ar_1-3.htm and https://www.ideadata.org/tables29th/ar_2-5.htm.

But contrary to the views expressed by petitioner's *amici*, the cost does not vary significantly between public and private schools.

It is important to note, however, that such comparisons are difficult to make for at least two reasons. First, in calculating the respective costs of educating a student in a public or private school, the costs are not always measured in the same way. While private school tuition rates reflect all costs, a public school's measure of costs for educating a child with a disability often excludes pension, social security, and health benefits on retirement, as well as facilities construction and associated debt service. Those costs are normally paid by state and/or county tax dollars, not by local school districts, and thus public schools may understate the actual cost of educating children, including children with disabilities, in a public education setting by 25% or more. *See* ASAH, *The Full Cost to New Jersey's Taxpayers for Self-Contained Special Education Programs: A Comparative Analysis of Local Public, County-based, and Private Special Education Programs* 18 (Nov. 2007).

Second, the characteristics of children with disabilities who end up educated in private school vary from the other children with disabilities. When educated within the public school system, students who are classified as emotionally disturbed, having mental retardation, multiply-disabled, or autistic have significantly higher per-pupil costs than other children with disabilities. Almost three-quarters of the children that the Center for Special Education

Finance refers to as "high expenditure" students are drawn from children with these disabilities: multiple disabilities (32.3%); autism (17.2%); emotional disturbance (16.2%); and mental retardation (7.1%).[10]

The average cost of educating a "high expenditure student" in public school in 1999-2000 was $39,909 for elementary school, $35,924 for secondary school, and $57,129 in a public school dedicated to special education.[11] Although no similar breakdown is available for private schools, the average expenditure on tuition, fees, and other special services for children with disabilities placed in private schools or other public agencies was $25,580 in 1999.[12]

In New York City and Los Angeles, for example, the per-pupil cost of special education in public schools is significantly greater than the average settlement those cities claim to have paid in unilateral placement cases. In 2004-2005 and 2005-2006, the average cost of educating a full-time special education student in the New York City public

---

[10] *See* Jay G. Chambers *et al.*, Special Education Expenditure Project, Center for Special Education Finance, *Characteristics of High-Expenditure Students With Disabilities, 1999-2000, Report 8*, at 21 (May 2004).

[11] *See id.* at 4-5.

[12] *See* Jay G. Chambers *et al.*, Special Education Expenditure Project, Center for Special Education Finance, *Total Expenditures for Students with Disabilities, 1999-2000: Spending Variation by Disability, Report 5*, at v, 4-5 (June 2003).

schools was $35,355 and $40,646, respectively,[13] yet it claims its average settlement in tuition cases for those years was $18,552 and $13,717, respectively.[14] Similarly, in 2006-2007 and 2007-2008, the average special education expenditure per special education student in Los Angeles was $16,403 and $17,080, respectively, while that city contends the average claim for private school tuition for those years was $17,774 and $16,294.[15]

Moreover, the local school district will not bear the costs alone. The majority of States have safety net programs allowing school districts to seek state reimbursement of costs when they exceed a certain threshold. "High cost special education disability funding is * * * commonly found across the states. Each state differs somewhat as to exactly how districts are able to qualify for claims under such programs, but all serve as a form of local insurance designed to assist districts faced with unusually high special education expenses." Thomas B. Parrish &

---

[13] New York City Dep't of Educ., *School Based Expenditure Reports School Year 2004-2005, Citywide, By Student Type, available at* https://www.nycenet.edu/offices/d_chanc_oper/budget/exp01/y2004_2005/function.asp?R=2; New York City Dep't of Educ., *School Based Expenditure Reports School Year 2005-2006, Citywide, By Student Type, available at* https://www.nycenet.edu/offices/d_chanc_oper/budget/exp01/y2005_2006/function.asp?R=2.

[14] New York City Dep't of Educ. Tuition Survey, at 4-5 (2007).

[15] Los Angeles Unified Sch. Dist. Tuition Survey, at 1-2 (2009).

Jenifer J. Harr, American Institutes for Research, *Special Education Funding In Oregon: An Assessment of Current Practice with Preliminary Recommendations* 5 (Aug. 7, 2007), *available at* http://csef.air.org/publications/related/AIR%20OR%20SE%20Finance%208_7_07.pdf. The State of Oregon, for example, has created a High Cost Disabilities fund for reimbursing school districts when the expenditures for a child exceed $30,000 for the fiscal year. *See* Or. Rev. Stat. § 327.348. Thus, the system already has measures in place to mitigate a school district's burden for children with greater needs and, thus, higher costs, whether educated in a public school, in an agreed private placement, or in a unilateral placement subsequently found to be necessary by a hearing officer in a due process hearing or judge in litigation.

3. Private placement costs fall only on school districts that do not provide the appropriate public education required by federal law

Many of the objections voiced by petitioner and its *amici* are objections to the cost of special education or court-ordered placements generally. They gloss over the fact that those decisions by hearing officers and judges to reimburse parents of children with disabilities placed in private school are based on findings that public school systems *did not comply with the IDEA* because they did not offer an appropriate education for the children or, as in this

case, refused to even acknowledge that the child has a disability.

Those decisions where the parent is the prevailing party are not easily achieved. In light of this Court's decision in *Schaffer v. Weast*, 546 U.S. 49, 59-60 (2005), parents will (absent state law to the contrary) normally bear the burden of proof of showing that the school district did not comply with the IDEA. Furthermore, the IDEA now makes clear (in a provision enacted after the events at issue in this case) that even blatant violations of certain procedural provisions of the IDEA are not sufficient to have an IEP declared invalid. *See* 20 U.S.C. § 1415(f)(3)(E)(ii).

Compliance and monitoring reports by the United States Department of Education have revealed, nonetheless, that in many localities, school districts are not in compliance with federal law. Indeed, sometimes the school district simply admits as much. Thus in *Frank G. v. Board of Education*, 459 F.3d 356, 361 (2d Cir. 2006), *cert. denied*, 128 S. Ct. 436 (2007), the school board challenged reimbursement for a family's placement of a child in a private school because the child never received special education under the authority of a public agency, despite the fact that the school system conceded at the due process hearing that its proposed

IEP did not offer an appropriate education.[16] The myriad cases in which federal and state courts have made similar findings of noncompliance with IDEA's substantive standards confirm this reality. *See also* New York State Comptroller, *Waiting for Special Education*, Report No. 3-2009, at 8 (June 2008), *available at* http://www.osc.state.ny.us/osdc/rpt3-2009.pdf ("The number of unfilled recommendations for related services [in New York City] more than doubled from 28,624 in June 2003 to 64,897 in June 2007.").

The National Council on Disability, an independent federal agency, succinctly summarized the Department of Education's findings: "Every state was out of compliance with the IDEA requirements to some degree; in the sampling of states studied, noncompliance persisted over many years." National Council on Disability, *Back to School on Civil Rights: Advancing the Federal Commitment to Leave No Child Behind* 7 (Jan. 25, 2000), *available at* http://

---

[16] According to the facts as described in the court of appeals' opinion, the child's declining performance at a Catholic school prompted his parents to request an evaluation from the public school. *Frank G.*, 459 F.3d at 359-360. During the evaluation process, an independent neuropsychologist recommended that the child, who had been diagnosed with attention deficit hyperactivity disorder at the age of three, be placed in a small classroom of 12 students with an aide and related services. *Id.* at 360. The school district's IEP nonetheless proposed a classroom of 26-30 students. *Ibid.*

www.ncd.gov/newsroom/publications/2000/backtoschool_1.htm#2.

Indeed, seven years earlier, the same federal agency reported that the Department of Education had determined that "150 of the 165 local public agencies" surveyed were "in varying degrees of noncompliance with federal and state IEP mandates" and that another Department of Education study of 40 local school districts across 21 States found that almost 10 percent of students with disabilities "either do not have an IEP or have not been properly evaluated" in violation of federal law. National Council on Disability, *Serving the Nation's Students with Disabilities: Progress and Prospects* 3, 25 (Mar. 4, 1993), *available at* http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/13/9b/d8.pdf.

B. Congress Did Not Clearly Manifest An Intent To Prohibit Courts From Ordering Reimbursement When A School District Violates Federal Law

The question here is whether the IDEA leaves parents of a child with a disability only the choice between accepting the school district's erroneous determination that the child has no disability or paying for an appropriate education with no possibility of reimbursement even if they ultimately establish the school district's error.

When parents are confronted with a school district that they believe is violating federal law by its failure to propose or provide their child a free appropriate education, as required by the IDEA, they are dependent on the federally designed administrative "due process" proceedings and ultimately on the courts to vindicate their federal rights. It takes time, however, for this comprehensive process to resolve disputes. This Court has described the process as "ponderous" and has taken note of the fact that a "final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed." *Sch. Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985). Indeed, States are often in violation of the IDEA's requirements regarding how long a due process proceeding may take. *See* National Council on Disability, *Back to School on Civil Rights*, *supra*, at 121 (Department of Education found 36% of States failed to resolve due process hearings within the 45 days required by regulations). This case has dragged on for years without a final resolution of respondent's rights under the IDEA. In the meantime, children who remain in an inappropriate placement or end up at home suffer educational setbacks from lost learning opportunities.

In *Burlington*, 471 U.S. at 372, and again in *Florence County School District v. Carter*, 510 U.S. 7 (1993), this Court held that Congress did not intend to force parents to choose between "an appropriate

education and a free one." The Court held that the plain language of the IDEA authorizes parents to receive reimbursement of reasonable private school tuition if the school district was not offering an appropriate education.

Although petitioner suggests that the burden is on Congress in a Spending Clause statute to make clear in the statute the scope of a court's equitable authority for violations of that statute, respondent shows that Congress must employ a clear statement if it wishes to restrict a court's equitable authority. Resp. Br. 27-29. Further, as *amicus* Council of Parent Attorneys and Advocates documents, the IDEA is also an exercise of Congress's power to enforce the Fourteenth Amendment, and statutes enacted pursuant to that authority do not require a clear statement even if they impose burdens on state and local governments. *See Hutto v. Finney*, 437 U.S. 678, 698 n.31 (1978).

In any event, Congress made clear in the text of the statute, in the legislative history, and in its subsequent 2004 re-enactment of the IDEA that it did not intend to categorically deny the equitable remedy of reimbursement to children with disabilities simply because they had not previously received special education under the authority of a public agency.

1. Congress has not altered the statutory provisions that this Court correctly interpreted in *Burlington* and *Carter* to authorize courts to order reimbursement when federal law has been violated

This Court relied on two statutory provisions as the basis for its determinations in *Burlington* and *Carter* that courts can award reimbursement. Congress did not alter either of those provisions (save for changes in terminology) in 1997 or by subsequent amendments. First, the Court looked to Section 1400(d)(1), which sets forth the purpose of the IDEA: to ensure that all children with disabilities (formerly described as "handicapped" children) "have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs" and to ensure "that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(1). Second, the Court relied on Congress's grant to federal courts the authority to hear claims by aggrieved parents that their statutory rights were being violated without regard to the amount in controversy and authorized those courts to "grant such relief as the court determines is appropriate" for violations of the statute. *Id.* § 1415(i)(2)(C)(iii).

In *Burlington*, the Court held in a unanimous opinion by Chief Justice Rehnquist that the language used by Congress in that grant of authority to award "appropriate" relief "confers broad discretion on the court." 471 U.S. at 369. The Court explained that,

absent an equitable remedy of reimbursement, the parents were faced with the Hobson's choice to accept a school district's proposed placement "to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement." *Id.* at 370. The Court concluded that "[i]f that were the case, the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete." *Ibid.* Congress "undoubtedly" could not have intended that result. *Ibid.* This Court was therefore "confident that by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement to parents." *Ibid.*

In *Carter*, the Court unanimously reaffirmed that the "IDEA's grant of equitable authority empowers a court 'to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act.'" *Carter*, 510 U.S. at 12 (quoting *Burlington*, 471 U.S. at 369). The "IDEA was intended to ensure that children with disabilities receive an education that is both appropriate and free. To read the provisions of [the IDEA] to bar reimbursement in the circumstances of this case would defeat this statutory purpose." *Id.* at 13-14 (internal citation omitted). The Court clarified that parents are "entitled to reimbursement *only* if a federal court concludes both that the public

placement violated IDEA and that the private school placement was proper under the Act." *Id.* at 15.

The broad statutory grant of authority in Section 1415(i)(2)(C)(iii) to award "appropriate" relief, relied on by the Court in both *Burlington* and *Carter*, has not been amended. Thus, nothing in the text of the IDEA reflects an intent by Congress to constrict the power of the courts to award "appropriate" relief, including reimbursement of tuition, to parents under appropriate circumstances.

2. Petitioner's reading of Section 1412(a)(10)(C) is contrary to its legislative history

Section 1412(a)(10)(C) describes circumstances under which the courts "may" grant or deny reimbursement when a child "previously received special education and related services under the authority of a public agency." But that provision does not prohibit the exercise of a court's equitable authority to award reimbursement to parents in circumstances that fall outside the scope of Section 1412(a)(10)(C).

Nothing in the legislative history suggests that Congress intended Section 1412(a)(10)(C) to categorically exclude from the equitable remedy of reimbursement children with disabilities who did not previously receive special education or related services under the authority of a public agency, but can establish that they have been denied an appropriate education by the public school.

a. As respondent discusses, although this issue arises only very sparsely in the legislative history, the statements of the supporters of the 1997 IDEA amendments demonstrate that the enactment of Section 1412(a)(10)(C) was not intended as a departure from the state of the law at that time. *See* Resp. Br. 25 (citing statements of Senators Harkin and Jeffords). Indeed, several proponents of the 1997 IDEA amendments declared that the amendments would preserve all of the core rights that the IDEA granted parents of children with disabilities. Representative Miller stated that the amendments would "maintain[ ] the fundamental rights" in the IDEA, including "that parents are entitled to pursue all legal avenues available for them to ensure" that their child receives a free appropriate education. 143 Cong. Rec. H2536 (daily ed. May 13, 1997). Likewise, Senator Harkin explained that the amendments "retain[ed] all of the basic rights and protections available under current law." 143 Cong. Rec. S4299 (daily ed. May 12, 1997).

The statements of Representative Castle, to which petitioner and its *amici* cite, are not to the contrary. Representative Castle's statement that the amendments would "make[ ] it harder for parents to unilaterally place a child in elite private schools at public taxpayer expense," 143 Cong. Rec. at H2536, was undoubtedly true, but not because the amendments *categorically* excluded children with disabilities who had not previously received special education from a state agency. Rather, as respondent

explains, Resp. Br. 26, and as shown below, the comments were true because of the Section 1412(a)(10)(C) guidance on notice, cooperation, and reasonableness.

b. Rather than exclude an entire class of children with disabilities from reimbursement for private school placement, the legislative history confirms that Section 1412(a)(10)(C) was intended to codify the notice requirement that existed in the prevailing case law—specifically, that a court may consider, in exercising its remedial discretion to award reimbursement, whether the parents provided notice to the school district that they intended to place their child in private school because of dissatisfaction with the proposed IEP. That notice requirement is inapposite in a case like this, where the petitioner school district did not propose any IEP at all because it believed that respondent was not eligible for special education.

The small amount of discussion at the hearings regarding the reimbursement issue prior to 1997 reflects only a desire that Congress clarify that notice and cooperation by parents were appropriate factors that should be considered in determining whether to award reimbursement. There was no suggestion that children who had not previously received special education or related services from a school district should never receive reimbursement, the view currently urged by petitioner.

In a congressional hearing regarding the reauthorization of the IDEA in 1994, the National School Board Association urged Congress to amend the IDEA to expressly provide that "[i]n cases where parents are seeking to place their child in a private school, the school needs to be given adequate advance notice of the services the parents desire." *Hearing on the Reauthorization of the Individuals with Disabilities Education Act: Before the Subcomm. on Select Educ. & Civil Rights of the House Comm. on Educ. and Labor*, 103d Cong. 43 (1994). It explained that requiring advance notice "is cost efficient and still fully protects the rights of students with disabilities." *Ibid.*

The following year, the General Counsel of the Orange County Department of Education explained to Congress that his office had been working with various national and state education organizations to provide recommendations for changes in the IDEA. He stated that the proposal that had been developed "[w]ith regard to unilateral placement of students in private facilities" was that parents would be required "to notify school districts before placing their child in a private school that they intend to seek tuition reimbursement from the school district." *Hearings on the Individuals with Disabilities Educ. Act: Before the Subcomm. on Early Childhood, Youth & Families of the House Comm. on Econ. & Educ. Opportunities*, 104th Cong. 279 (1995); *see also id.* at 290 (California School Boards Association urges provision requiring parents "to provide ample notice and opportunity for

the districts to provide appropriate services through their own public means" before "unilateral placement of students in non-public schools by parents"); *Hearing on Early Childhood, Youth & Families Staff Draft of the IDEA Improvement Act: Before the Subcomm. on Early Childhood, Youth & Families of the House Comm. on Econ. and Educ. Opportunities*, 104th Cong. 10 (1996) (California school district urges that reimbursement be denied unless there is notice and "the parents or guardian have cooperated in good faith with the local education agency to develop an individualized education program for the child or youth prior to seeking the non-public service or placement").

When a predecessor to Section 1412(a)(10)(C) appeared in a version of the bill reported out of the House Committee on Economic and Education Opportunities in 1996, the committee stated that school districts were sometimes "confronted with the very rare situation where parents place a child in private school without notifying the school district" and that the proposed bill "would require such parents to notify, at a minimum, a local education agency of their concerns, and provide the opportunity for the school to evaluate the child and determine if it can meet that child's needs." H.R. Rep. No. 104-614, at 12 (1996). That committee bill passed in the House but no action was taken in the Senate.

The key point is that the intent of the amendments was to evaluate the child and develop

and implement an IEP that "meet[s] that child's needs." *Ibid.* If the school district could not meet those needs, it would be inconsistent with the IDEA and bad for the child to be placed in an inappropriate educational program.

In hearings the following year, some witnesses supported what they described as the "written notification" language of what would become Section 1412(a)(10)(C). *See Hearings on H.R. 5, The IDEA Improvement Act of 1997: Before the Subcomm. on Early Childhood, Youth & Families of the House Comm. on Educ. & the Workforce*, 105th Cong. 12 (1997) (Los Angeles County Office of Education); *id.* at 80-81 (California Special Education Local Plan Area). A few witnesses urged that Congress eliminate any reimbursement remedy for a unilateral placement in private school. *See Reauthorization of the Individuals with Disabilities Education Act: Before the Senate Comm. on Labor & Human Resources*, 105th Cong. 31 (1997) (Chairman of Bedford School Board); *id.* at 106 (Council for Exceptional Children). But there was no suggestion that Congress should eliminate the reimbursement remedy for one category of students (*i.e.*, those who did not previously receive special education and related services under the authority of a public agency) while permitting it for others.

Thus, it is the "notice" concept that is reflected in the Senate and House Committee reports in 1997, both of which describe the provision as providing that if "the parents do not comply with the notice

[requirement of the bill] and evaluation requests [of the public agency] or engage in unreasonable actions, hearing officers and courts may reduce or deny reimbursement to parents for unilateral private placements." S. Rep. No. 105-17, at 12 (1997); H.R. Rep. No. 105-95, at 92 (1997).

3. Congress has ratified the Secretary of Education's repeated interpretation of the IDEA as granting authority to award reimbursement for private placement even where the child had not previously received special education under the authority of a public agency

As respondent explains, the Secretary of Education, who was intimately involved with the enactment of the 1997 IDEA amendments, has repeatedly interpreted Section 1412(a)(10)(C)(ii) as not limiting the equitable remedy of reimbursement for private school education to only those children who had previously received special education from a public agency. *See* Resp. Br. 39-40.

In the course of promulgating regulations to implement the 1997 IDEA amendments, the Secretary of Education in 1999 rejected a request to amend its regulation to treat Section 1412(a)(10)(C)(ii) as limiting Section 1415(i)(2)(C)(iii). The Secretary reasoned that courts and hearing officers retained the authority, recognized in *Burlington* and *Carter,* to award "appropriate" relief such as private education reimbursement under Section 1415(i)(2)(C)(iii) and

that this authority was "independent" of their authority under Section 1412(a)(10)(C)(ii) to award private education reimbursement to parents of children who had previously received special education under the authority of a public agency. 64 Fed. Reg. 12,406, 12,602 (Mar. 12, 1999). And in a published letter dated March 19, 1999, the Department of Education again explained that no provision of the IDEA "makes a child's prior receipt of special education and related services from a public agency a prerequisite to a parent's obtaining tuition reimbursement from a hearing officer or court for the cost of a unilateral private school placement." 65 Fed. Reg. 9178, 9178 (Feb. 23, 2000).

"It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986); *see also Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."). Thus, when Congress fully re-enacted Sections 1412(a)(10)(C) and 1415(i)(2)(C)(iii), without amendment in 2004, *see* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, sec. 101, §§ 612(a)(10)(C), 615(i)(2)(C)(iii),

118 Stat. 2647, 2682-2683, 2724, Congress ratified the Secretary's consistent, published interpretation.

CONCLUSION

For the reasons set forth above and in respondent's brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

BRIAN R. MATSUI
SETH M. GALANTER
Counsel of Record
LINDA A. ARNSBARGER
MARC A. HEARRON
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-1500

CARL H. LOEWENSON, JR.
MORRISON & FOERSTER LLP
1290 Avenue of the Americas
New York, N.Y. 10104

Counsel for Amici Curiae

APRIL 1, 2009

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
MAR 4 - 2009
OFFICE OF THE CLERK

122 (b)

No. 08-305

IN THE

Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,
Petitioner,

v.

T.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF PETITIONER

ROBERT H. CHANIN
MICHAEL D. SIMPSON
NATIONAL EDUCATION ASSOCIATION
1201 16th Street N.W.
Washington, DC 20036
(202) 822-7035

JOHN M. WEST
(Counsel of Record)
BREDHOFF & KAISER, P.L.L.C.
805 15th Street N.W.
Suite 1000
Washington, DC 20005
(202) 842-2600

Counsel for Amicus Curiae

March 4, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BOTH 40A8I9

936C

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page

Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006) 5, 9
Board of Educ. v. Tom F., 128 S. Ct. 1 (2007) 7, 9, 11
Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993) 8
Greenland Sch. Dist. v. Amy N., 358 F.3d 150 (1st Cir. 2004) 12
Schaffer v. Weast, 546 U.S. 49 (2005) 7, 8
School Comm. of Burlington v. Department of Educ., 471 U.S. 359 (1985) 8

STATUTES, REGULATIONS, AND LEGISLATIVE MATERIAL

20 U.S.C. §§ 1400 *et seq.* 2, 4
20 U.S.C. § 1400(d)(1)(A) 4
20 U.S.C. § 1412(a)(10)(B) 5
20 U.S.C. § 1412(a)(10)(C) 10
20 U.S.C. § 1412(a)(10)(C)(ii) ..... *passim*
20 U.S.C. § 1412(a)(10)(C)(iii) 10
20 U.S.C. § 1415(i)(2)(C) 10
34 C.F.R. § 300.8(c)(9) 6
34 C.F.R. § 300.104 4
143 Cong. Rec. H2536 (daily ed. May 13, 1997) 9, 13

MISCELLANEOUS

2A Norman J. Singer, Sutherland Statutory Construction (7th ed. 2008) 10

IN THE

Supreme Court of the United States

No. 08-305

FOREST GROVE SCHOOL DISTRICT,
Petitioner,

v.

T.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The National Education Association ("NEA") is a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed by public school districts, as well as colleges and universities, throughout the United States.[1] Included among NEA's members are over

[1] This brief is filed with the written consent of both parties. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended

200,000 teachers and other education employees in the field of special education. Most of NEA's other members are regular education teachers, whose classrooms frequently include children with disabilities and who, under the IDEA, participate in teams developing Individualized Education Programs for such children. Nearly all of NEA's members in K-12 education, therefore, deal on a regular basis with implementation of the statute at issue in this case, the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq*.

Since its inception in 1975 as the Education for All Handicapped Children Act, NEA has been a vigorous supporter of the IDEA and of its goal of providing a free appropriate public education in a least restrictive environment for all children with disabilities. NEA has been an integral member of a coalition of education organizations that have consistently worked to reauthorize and improve the IDEA and to attain its full funding by Congress.

NEA firmly and vigorously supports the IDEA's objective of ensuring that every child with a disability that adversely impacts his or her educational performance have access to a free appropriate public education. NEA submits this brief *amicus curiae* in support of the petitioner school district because it believes that the statutory construction adopted by the court below inhibits rather than furthers the attainment of that objective.

---

to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

SUMMARY OF ARGUMENT

The objective of the IDEA is to make available a free appropriate public education to all children with disabilities, and to that end public agencies are required to bear the cost of the services appropriate to each child's needs, notwithstanding the expense. That is as it should be. But it is also essential to the attainment of the IDEA's objectives that the funds provided under this statute not be misused to subsidize a private school education for children whose parents have chosen that option without regard to the availability of a free appropriate education in the public schools.

It is clear that school districts must bear the cost of private school tuition when, because of the nature of a child's disability, an appropriate education is not available through the school district's facilities. At issue here, however, are not tuition reimbursements for children for whom an appropriate education cannot be provided in the public schools, but rather the payment of private school tuition to parents who choose to place their child in a private school without first giving the public school district the opportunity to meet its statutory obligations.

The 1997 amendment to the IDEA reflects Congress' determination to preclude such "unintended and costly consequences" of allowing private school tuition reimbursement as a remedy for IDEA violations. After that amendment, the IDEA simply cannot fairly be read to allow awards of private school tuition, as the court below believed, *whether or not* the child "previously received special education and related services under the authority of a public agency." 20 U.S.C. § 1412(a)(10)(C)(ii).

In the alternative, if the Court is unwilling to read § 1412(a)(10)(C)(ii) as categorically excluding tuition reimbursements for children who have never received special education services in the public schools, it should nonetheless reverse the judgment below by holding that it is an abuse of discretion to order private school tuition reimbursement when the parents have failed to make a good-faith attempt to work with the school district, before placing their child in a private school, to determine whether a free appropriate public education can be provided for the child in the public schools.

ARGUMENT

1. Congress enacted the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq.*, in order "to ensure that all children with disabilities have available to them a free appropriate public education . . . ." 20 U.S.C. § 1400(d)(1)(A). In guaranteeing that right to all children with disabilities, Congress made no exception for children whose unique needs require educational services that are particularly costly. *See, e.g.*, 34 C.F.R. § 300.104 (residential placements must be provided where necessary at no cost to parents). Especially in the case of children with severe disabilities, the individualized attention and other special services that may be required are expenses that school districts must and should bear, notwithstanding that they may be well in excess of per-pupil expenditures for non-disabled students. And, in those cases in which the school district is unable to meet a student's particular needs in its own facilities, it is clear that the school district must provide that student with a free appropriate public education by paying the child's tuition to receive that education in a specialized private institu-

tion that is capable of providing the services appropriate to the student's needs. *See* 20 U.S.C. § 1412(a)(10)(B).

But precisely because special education is so costly, it is important to the success of the IDEA and of the public schools generally that the funds made available through the IDEA not be misused. It is a fact of life that the resources available to pay for public education in general, and special education in particular, are not unlimited. And, as the Court has previously remarked, "[t]he IDEA obviously does not seek to promote [its] goals at the expense of all other considerations, including fiscal considerations." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 303 (2006). To the extent the funds necessary for providing a free appropriate public education to children with disabilities must be used to subsidize a private school education for children whose parents have chosen that option without regard to the availability of a free appropriate education in the public schools, the ability of the public schools to provide a free appropriate public education to all children with disabilities – while at the same time providing a quality education to their non-disabled students as well – is not furthered but is in fact impaired.

2. It is important to be clear about what is at issue here. As more fully set forth by petitioner, *see* Brief of Petitioner at 8-13, the parents of T.A. withdrew him from public school in mid-year and placed him in a private residential school without raising any issue with school district officials about whether T.A. was eligible for special education services under the IDEA and, if so, whether the public high school he had been attending was able to provide an appropriate educa-

tion for him.[2] Only after their son was enrolled in private school, and after they had retained an attorney, did T.A.'s parents ask the school district to evaluate their son under the IDEA. Upon conducting that evaluation, the school district concluded that the attention-deficit/hyperactivity disorder ("ADHD") with which T.A. had been diagnosed did not render him eligible for special education services under the IDEA because it did not adversely affect his educational performance.[3] The due process hearing officer subsequently disagreed with the school district's evaluation on that point, and on that basis ordered the school district to pay the $5,200 monthly tuition for the private residential school in which T.A.'s parents had placed him.

The premise for the award of private school tuition thus was not that "there [was] no appropriate public education available" in the public schools – as appears to have been assumed at several points during oral argument of this same issue last Term. Transcript of Oral Argument at 14, *Board of Educ. v. Tom*

---

[2] While T.A. had been evaluated for learning disabilities two years previously, the school district, with the concurrence of T.A.'s mother, determined that he was not disabled and was not eligible for special education. T.A.'s parents did not appeal or otherwise contest that determination, and no issue of any disability or of a free appropriate education was on the table between them and the school district at the time they unilaterally placed T.A. in a private school.

[3] Not all children within the disability classification "other health impairment" – which includes ADHD – are eligible for special education services under the IDEA. Rather, such children, like those in most of the other disability classifications, are defined as a "child with a disability" only if the impairment "[a]dversely affects [the] child's educational performance." 34 C.F.R. § 300.8(c)(9).

F., 128 S. Ct. 1 (2007) (No. 06-637) ("*Tom F.* Tr."); *see also id.* at 22 (assuming that "the starting premise of any reimbursement claim is that an appropriate public education is not available"). At the time T.A.'s parents withdrew their son from the public schools, they simply had no way of knowing whether or not the school district would be able to provide T.A. with a free appropriate public education – for they had not asked. And indeed, given the large numbers of students with ADHD who receive special education services in the public schools, it is most unlikely that a disability of this nature would have been one for which the school district would have been unable to provide an appropriate education in its own facilities.

The basis for the tuition reimbursement award was, in short, not a finding that the school district could not or would not make a free appropriate public education available to the child, but rather simply a determination that it had failed to do so – in this instance, by erroneously concluding that T.A. was not eligible for IDEA services.

The distinction is significant. Even if, as must be assumed at this juncture, the school district erred in finding T.A. ineligible – or if (as was the case in Tom F.) the Individualized Education Program ("IEP") drafted by the school district was held not to provide for an "appropriate" education – such mistakes could readily be corrected through "the cooperative process that [the IDEA] establishes between parents and schools," *Schaffer v. Weast*, 546 U.S. 49, 53 (2005), if the parents' objective was indeed to obtain for their child an appropriate education in the public schools, rather than to create a record that would permit an award of private school tuition.

Here, for example, there is no reason to believe that – were T.A. still in the public school system – the school district would not have responded to the hearing officer's determination that he was in fact eligible for special education services by convening an IEP team to prepare an Individualized Education Program that would provide him with a free appropriate public education. At all events, the contrary cannot be presumed. *See Schaffer*, 546 U.S. at 62-63 (Stevens, J., concurring) ("[W]e should presume that public school officials are properly performing their difficult responsibilities under this important statute.").

As this Court has held, there will undoubtedly be some "cases where cooperation fails," *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 12 (1993), and under such circumstances an order to reimburse private school tuition might be an appropriate remedy for the school district's failure to provide a free appropriate public education. *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359 (1985). But that cannot be the case where, as here, the parents withdraw their child from the public schools without giving the IDEA's "cooperative process" an opportunity to work,[4] and then use the school district's error in making the eligibility or IEP determination to seek reimbursement of their private school tuition.

3. It is, we submit, for this reason that Congress, in reauthorizing the IDEA in 1997, amended the statute

---

[4] We do not mean to suggest that T.A.'s parents may not have had good reason, in light of their son's drug abuse and behavioral problems, for deciding on short notice and without prior consultation with public school officials to place him in a private residential facility. But these are not "disabilities" within the meaning of the IDEA.

to clarify that, when parents unilaterally place their child in a private school, an order requiring the school district to pay the tuition charged by that school would be an available remedy under the IDEA *if* the child "previously received special education and related services under the authority of a public agency." 20 U.S.C. § 1412(a)(10)(C)(ii). As Representative Castle explained during the floor debate in the House, the amendment was intended to remedy the "unintended and costly consequences" of school districts being required to pay private school tuition "in cases where lawyers have gamed the system to the detriment of schools and children."[5] 143 Cong. Rec. H2536 (daily ed. May 13, 1997).

Little would be served were we to attempt here to duplicate the statutory interpretation provided by petitioner in its brief. Petitioner's analysis is, we submit, unassailable – particularly when the statutory language is viewed, as under *Arlington Central* it must be, *see* 548 U.S. at 294-96, through the lens of the Spending Clause's "clear notice" requirement.

Even without any recourse to legislative history, it is apparent from the statutory language itself that

---

[5] During oral argument of the *Tom F.* case, Justice Scalia offered the following example of what Congress had in mind in attempting to prevent such "gaming the system": "I thought it was simply Congress figured that there are probably a lot of people in New York City . . . who are going to send their kids to private school, no matter what . . . , but what the heck, if we can get $30,000 from the city to pay for it, that's fine. In other words, [a *Burlington* tuition reimbursement order] was meant to be an option for people who wanted to go to the public schools but couldn't go to the public schools because they couldn't get the [appropriate] services there, but it was never meant to be an option for people who had no desire to go to public schools at all anyway . . . ." *Tom F.* Tr. at 11-12.

Congress' purpose in enacting § 1412(a)(10)(C)(ii) was to codify – *but also to limit* – this Court's holding in *Burlington*, by restricting the tuition reimbursement remedy to those cases in which the child had already received special education services in the public schools. Were it otherwise, the clause "who previously received special education and related services under the authority of a public agency" would be wholly superfluous. On the reading adopted by the court below, the IDEA says exactly the same thing – that tuition reimbursement is a permissible remedy in any case of a school district's failure to provide a free appropriate public education – as it would if that clause had been left out. That cannot be the proper construction of Congress' intent. *See* 2A Norman J. Singer, *Sutherland Statutory Construction* § 46:06 (7th ed. 2008) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous . . . .").

And, as petitioner points out, Brief of Petitioner at 23, 40, the Ninth Circuit's interpretation that tuition reimbursement for students not coming within § 1412(a)(10)(C) can be ordered as a remedy under the pre-existing general remedial provisions of 20 U.S.C. § 1415(i)(2)(C) (which this Court construed in *Burlington*) has the perverse result that the limitations that Congress placed on tuition reimbursement in § 1412(a)(10)(C)(iii) simply do not apply – and the court thus has *greater* latitude in making such awards – in the case of children who have not previously received special education in the public schools.

In short, the statutory language of the IDEA cannot fairly be read – as the Ninth Circuit would have it – as authorizing courts to award private school tui-

tion reimbursement *whether or not* the child "previously received special education and related services under the authority of a public agency." 20 U.S.C. § 1412(a)(10)(C)(ii). Congress' express limitation of the tuition reimbursement remedy to children who had previously received special education services in the public schools serves to exclude from such – often quite costly – reimbursements those parents who are uninterested in an appropriate education in the public schools, whether it can be made available to their child or not.[6]

4. While we thus urge the Court to answer the question presented by holding that § 1412(a)(10)(C)(ii) categorically excludes the reimbursement of private school tuition as a remedy for an IDEA violation in the case of students who have not previously received special education services in the public schools, the

---

[6] It should not be surprising that Congress chose to pursue that objective through statutory language that, in codifying the *Burlington* holding, excludes those students who have not previously received special education services in the public schools. That the "fit" between that objective and the statutory language Congress selected may be something less than perfect is not evidence of irrationality but simply of the imperfection of what Congress apparently believed to be the best available objective standard to accomplish its purpose. Thus, even if it should be true, as was suggested at oral argument in the *Tom F.* case, that parents intent on sending their child to private school could avoid the tuition reimbursement limitation of § 1412(a)(10)(C)(ii) simply by placing the child in a public school special education program for eleven days, *see Tom F.* Tr. at 7-8, 9-10, 15, the existence of a potential loophole in the congressional scheme in no way overcomes the clear evidence, both from the statutory language and structure and from the legislative history, about what Congress was attempting to accomplish with this amendment.

judgment below should be reversed even if the Court is unwilling to reach that conclusion.

As petitioner observes, even prior to the 1997 IDEA amendments a number of decisions applying *Burlington* had concluded that tuition reimbursement was appropriate only if, prior to placing their child in a private school, the parents had attempted to work with the school district to determine whether a free appropriate public education could be provided in the public schools. *See* Brief of Petitioner at 31-32 n.2 (citing cases). The First Circuit explained that, "[a]lthough few courts precisely defined the level of cooperation necessary, most thought it clear that, at a minimum, the parents had to inform the school district of their concerns about their child's special needs and about the plan proposed *before removing the child from public school*." *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 159 (1st Cir. 2004) (emphasis added) (citing cases); *see also* Pet. App. 21a (Rymer, J., dissenting) ("tuition reimbursement for unilateral private placements is available under principles of equity only when FAPE was at issue before the child was withdrawn from public school and the school district had improperly denied a free and appropriate education").

As an alternative ground for reversal of the decision below, this Court could confirm that emerging consensus of the lower courts and hold that – to the extent a court has discretion to award tuition reimbursement to parents whose children have not previously received special education services in the public schools – it is an abuse of that discretion to make such an award when the parents failed to make a good-faith attempt to work with the school district, before placing their child in a private school, to de-

termine whether a free appropriate public education could be provided for their child in the public schools.

Such a resolution, while in our view less faithful to the statutory language Congress adopted in 1997, would preclude tuition awards in at least most "cases where lawyers have gamed the system to the detriment of schools and children," as Rep. Castle explained Congress' purpose in enacting the 1997 amendment. 143 Cong. Rec. H2536 (daily ed. May 13, 1997). But at the same time it would avoid any possibility of the unlikely scenarios cited by the Ninth Circuit as "absurd result[s]" that could occur if § 1412(a)(10)(C)(ii) were read to exclude categorically all children who had not previously received special education services in the public schools. *See* Pet. App. 15a-16a (suggesting that school districts could permanently preclude reimbursement by declining to recognize the student as disabled); *but see* Brief of Petitioner at 38-40 (explaining why such scenarios are unlikely to occur).

Application of this abuse-of-discretion standard would, in this matter, have the same result as the categorical rule that we contend is inherent in § 1412(a)(10)(C)(ii). Because the parents of T.A. made no attempt, prior to placing him in a private school, to work with the school district to determine whether a free appropriate public education could be provided to T.A. in the public schools – and indeed failed even to give the school district notice that they intended to enroll their son in private school – the tuition reimbursement award was an abuse of discretion.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

ROBERT H. CHANIN
MICHAEL D. SIMPSON
NATIONAL EDUCATION ASSOCIATION
1201 16th Street N.W.
Washington, DC 20036
(202) 822-7035

JOHN M. WEST
(Counsel of Record)
BREDHOFF & KAISER, P.L.L.C.
805 15th Street N.W.
Suite 1000
Washington, DC 20005
(202) 842-2600

Counsel for Amicus Curiae

March 4, 2009

AMICUS CURIAE BRIEF

12

(11)

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

No. 08-305

IN THE

Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,
Petitioner,

v.

T.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, AND NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION IN SUPPORT OF PETITIONER

Of Counsel:
FRANCISCO M. NEGRÓN, JR.
GENERAL COUNSEL
NAOMI GITTINS
NATIONAL SCHOOL BOARDS ASSOCIATION
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

MAREE F. SNEED*
JOHN W. BORKOWSKI
AUDREY J. ANDERSON
STEPHANIE J. GOLD
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6416

* Counsel of Record

Counsel for Amici Curiae

BUT 4 JAN 2010

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. REQUIRING ALL PARENTS AND STUDENTS TO COMPLY WITH THE REQUIREMENTS OF SECTION 1412(A)(10)(C) IS CONSISTENT WITH THE PURPOSE AND STRUCTURE OF IDEA 7

A. IDEA's History and Fundamental Requirements Show that Appropriate *Public* School Placements Are Preferred 9

B. IDEA Establishes a Collaborative Framework for Parents and Public Schools to Work in Tandem to Ensure Appropriate Educational Programs for Children with Disabilities 11

C. IDEA Provides Numerous Effective Procedural Protections to Parents and Students that Ensure Quality Education and Prevent "Absurd Results" 15

II. THE NINTH CIRCUIT'S RULING DISTORTS THE DISPUTE RESOLUTION PROCESS UNDER IDEA AND DISRUPTS EFFECTIVE ADMINISTRATION OF SPECIAL EDUCATION SERVICES 19

A. Parents Would Obtain an Unfair Litigation Advantage by Refusing to Give School Districts an Opportunity to Attempt to Provide a Free Appropriate Public Education..... 19

B. Allowing Unilateral Private Placements for Students who Never Have Received Special Education Services from a Public School Would Undermine Districts' Ability to Accurately Budget for and Provide Special Education Services 23

III. PERMITTING REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENTS MADE BEFORE THE CHILD EVER RECEIVES SPECIAL EDUCATION SERVICES FROM A PUBLIC SCHOOL WOULD INCREASE LITIGATION COSTS AND DIVERT RESOURCES FROM EDUCATION 25

A. Litigation Costs Under IDEA Are High..... 25

B. The Ninth Circuit's Decision Will Encourage Litigation..... 27

CONCLUSION..... 29

TABLE OF AUTHORITIES

Page

CASES:

Arlington Cent. Sch. Dist. Bd. of Educ. v. *Murphy*, 548 U.S. 291 (2006) 2, 6, 15

Board of Educ. v. *Tom F. ex rel. Gilbert F.*, 128 S. Ct. 1 (2007) 2

Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. *Rowley*, 458 U.S. 176 (1982) 4, 9, 11, 19

Burlington Sch. Comm. v. *Department of Educ.*, 471 U.S. 359 (1985) 3, 28

Florence County Sch. Dist. Four v. *Carter*, 510 U.S. 7 (1993) 28

Forest Grove Sch. Dist. v. *T.A.*, 523 F.3d 1078 (9th Cir. 2008) ..... *passim*

Hessler ex rel. Britt v. *State Bd. of Educ.*, 700 F.2d 134 (4th Cir. 1983) 10

Honig v. *Doe*, 484 U.S. 305 (1988) 11, 13

Justin G. ex rel. Gene R. v. *Bd. of Educ. of Mont. Co.*, 148 F. Supp. 2d 576 (D. Md. 2001) 22

Konkel v. *Elmbrook Sch. Dist.*, 348 F. Supp. 2d 1018 (E.D. Wis. 2004) 22

TABLE OF CONTENTS Continued

Page

M.C. ex rel. J.C. v. *Central Reg'l Sch. Dist.*, 81 F.3d 389 (3d Cir. 1996) 21

M.S. ex rel. M.S. v. *Mullica Twp. Bd. of Educ.*, No. 06-533, 2007 WL 1096804 (D.N.J. Apr. 12, 2007), *aff'd*, 263 F. App'x 264 (3d Cir. 2008) 14

Schaffer ex rel. Schaffer v. *Weast*, 546 U.S. 49 (2005) ..... *passim*

T.F. v. *Specialty Sch. Dist. of St. Louis County*, 449 F.3d 816 (8th Cir. 2006) 10, 21

STATUTES:

20 U.S.C. §§ 140[illegible] *seq.* 2

20 U.S.C. § 1400(c)(2) 9

20 U.S.C. § 1400(d)(1)(A) 4, 15

20 U.S.C. § 1412(a)(5) 10, 15

20 U.S.C. § 1412(a)(10)(B) 14

20 U.S.C. § 1412(a)(10)(C) ..... *passim*

20 U.S.C. § 1412(a)(10)(C)(ii) ..... *passim*

20 U.S.C. § 1412(a)(10)(C)(iii) 8, 17

20 U.S.C. § 1412(a)(10)(C)(iii)(I) 13, 16

20 U.S.C. § 1414(b)(3)(B) 18

20 U.S.C. § 1414(b)(4) 11

TABLE OF CONTENTS Continued

Page

20 U.S.C. § 1414(d) 11
20 U.S.C. § 1414(d)(3-4) 12
20 U.S.C. § 1414(d)(3)(D) 12
20 U.S.C. § 1414(d)(4)(A) 12
20 U.S.C. § 1415(b)(6)(B) 28
20 U.S.C. § 1415(b)(7)(A) 28
20 U.S.C. § 1415(c)(2)(B)(i)(I) 16
20 U.S.C. § 1415(e) 16, 28
20 U.S.C. § 1415(f)(1)(B) 16

RULES:

Sup. Ct. R. 37.3 1
Sup. Ct. R. 37.6 1

REGULATIONS:

34 C.F.R. § 300.148(d) 13, 16
34 C.F.R. § 300.510(b)(1)-(2) 17
34 C.F.R. § 300.515(a) 17

LEGISLATIVE

H.R. Rep. No. 94-332 (1975) 9
H.R. Rep. No. 108-77 (2003) 27, 28
S. Rep. No. 104-275 (1996) 26

TABLE OF CONTENTS Continued

Page

OTHER AUTHORITIES:

Melanie Asmar, *Special Education Costs Soar; Unpredictable Bill Can Strain Local Districts,* Concord Monitor, Feb. 17, 2008 24

Jay G. Chambers, *et al.*, American Institutes for Research, *What Are We Spending on Procedural Safeguards in Special Education, 1999-2000, Report 4* (May 2003) 25, 27

Jay G. Chambers, *et al.*, American Institutes for Research, *What Are We Spending on Special Education Services in the United States, 1999-2000, Report 1* (June 2004) 24

Ann Lordeman, *Individuals with Disabilities Education Act (IDEA): Current Funding Trends*, CRS Report for Congress (April 11, 2008) 6

Meaghan M. McDermott, *Special Ed*, Rochester Democrat and Chronicle, Dec. 2, 2007 24

U.S. Dep't of Educ., *Twenty-fourth Annual Report to Congress on the Implementation of IDEA* (2002) 26, 27

U.S. Dep't of Educ., IDEA data, Table 2-5 ..... 14, 26

STATEMENT OF INTEREST OF AMICI CURIAE[1]

The National School Boards Association ("NSBA") is a federation of state associations of school boards from throughout the United States, the Hawaii State Board of Education, and the board of education of the U.S. Virgin Islands. NSBA represents over 95,000 of the Nation's school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 49.8 million public school students, or approximately 90 percent of the elementary and secondary students in the nation.

The American Association of School Administrators ("AASA"), founded in 1865, is the professional association of over 14,000 local school system leaders across America. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children. AASA supports equal educational opportunity as a key factor in providing the highest quality public education for all children.

The National Association of State Directors of Special Education ("NASDSE") is a not-for-profit organization established in 1938 to promote and

[1] Pursuant to Sup. Ct. R. 37.6, amici note that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Sup. Ct. R. 37.3, counsel further notes that counsel of record for the parties have consented to the filing of this brief.

support education programs and related services for children and youth with disabilities. NASDSE's members include the state directors of special education in all 50 states, the District of Columbia, the Department of Defense Education Agency, the Bureau of Indian Education, federal territories and the Freely Associated States. NASDSE's primary mission is to support students with disabilities by providing services to state educational agencies to facilitate their efforts to maximize educational and functional outcomes for students with disabilities.

Amici regularly represent their members' interests before Congress and federal and state courts and have participated as *amicus curiae* in cases before this Court involving the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* ("IDEA"). *See, e.g.*, *Bd. of Educ.* v. *Tom F. ex rel. Gilbert F.*, 128 S. Ct. 1 (2007) (per curiam); *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291 (2006); *Schaffer ex rel. Schaffer* v. *Weast*, 546 U.S. 49 (2005). *Amici* filed a brief in support of the petition for writ of *certiorari* in this very case.

Recognizing that all children with disabilities have a right to be provided with a free appropriate public education, NSBA, AASA and NASDSE have consistently supported the rights of disabled children. At the same time, *amici* are also fully cognizant of the substantial financial and human resources that public school districts devote each and every year to educating students with disabilities. These resources vastly exceed the partial funding provided by the federal government under IDEA. The burden on local school districts also is increased by an adversarial conception of IDEA, which exacts an even greater toll on limited educational resources and thus exacerbates the difficulty for school

districts in deciding what educational opportunities they can afford to provide for children.

NSBA, AASA and NASDSE, therefore, assign critical importance to the issue presented in this case: whether Congress in IDEA authorized tuition reimbursement for parents who unilaterally place their children in private schools, where those children have never previously received special education services from the public schools. Like the petitioner, amici contend that the answer is no.

SUMMARY OF ARGUMENT

In *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985), this Court held that private school tuition reimbursement was an available remedy under IDEA if a school district failed to provide a free appropriate public education to a child with a disability, even though the statute was silent on that point. Congress thereafter amended IDEA in 1997 to allow a tuition reimbursement remedy only where the child has "previously received special education and related services under the authority of a public agency." 20 U.S.C. § 1412(a)(10)(C)(ii).

The Ninth Circuit decision giving rise to this case, *Forest Grove Sch. Dist.* v. *T.A.*, 523 F.3d 1078, 1087 (9th Cir. 2008), ignored the plain language and clear intent of the 1997 amendment, and disagreed with Congress' policy choice in holding that "[f]or students who never received special education and related services * * *, the new provisions of § 1412(a)(10)(C) simply do not apply." To apply this section of IDEA to all parents and students seeking reimbursement

for private school tuition would, according to the Ninth Circuit, "lead to [an] absurd result." *Id.* The Court of Appeals erred. Because IDEA favors public school placements, establishes a collaborative framework that integrally involves parents and public school officials, and provides multiple methods for timely dispute resolution, Congress sensibly required parents to work with public school districts before being able to obtain unilaterally a publicly funded private school education.

Congress enacted the Education of All Handicapped Children Act of 1975 with the goal of opening "the door of *public* education to handicapped children"—not to provide publicly funded private school education to children with disabilities. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist.* v. *Rowley*, 458 U.S. 176, 192 (1982) (emphasis added). Renamed IDEA in 1991, the Act today continues to "ensure that all children with disabilities have available to them a free appropriate public education." 20 U.S.C. § 1400(d)(1)(A). In accord with its fundamental purpose, virtually all of the Act's many substantive and procedural requirements apply only to public schools and protect only children attending public schools.

The Act also establishes a collaborative framework that requires ongoing cooperation between school districts and parents or guardians in developing, implementing, and refining, as the child develops, each student's educational program. Congress' decision to require parents to give this process a fair chance before being eligible for private school tuition reimbursement supports this overall framework. This structure depends upon the good faith participation of both school district personnel and the parents and guardians of disabled children. The

cooperative process results in the development, implementation and continuous adaptation of an individualized education program ("IEP") designed to ensure that each student receives a free public education that is appropriate to his or her individual needs. The process is dynamic; it gives parents multiple opportunities to effect a change in services they believe to be inadequate. These opportunities, along with the prompt dispute resolution mechanisms mandated by the Act, alleviate any fear that children with disabilities would be forced to languish for extended periods in inappropriate placements to preserve their entitlement to tuition reimbursement. By ignoring these aspects of the law, the Ninth Circuit's ruling seriously undermines IDEA's collaborative framework. Indeed, the Ninth Circuit's interpretation of IDEA would unfairly advantage parents who unilaterally place a disabled child in a private school and then litigate against the public school district later to obtain tuition reimbursement.

Reimbursing the cost of unilateral placements for parents who have not given a public school placement a fair chance or as here, who have removed their children before they have even been identified as disabled—also would increase the already substantial costs of the Act. Litigation costs, of course, would increase. More expensive private school placements would be sought and approved. The federal government funds only about twenty percent of IDEA's cost, meaning that the inevitable result of increased costs would be to divert not only federal, but also state and local resources to private schools and diminish the funding available for special education and regular education programs in

public schools.[2]

By holding that § 1412(a)(10)(C)(ii) does not apply to parents who do not give public schools a fair chance to meet the needs of their disabled child or who have no genuine interest in obtaining a public education for that child at all, the Ninth Circuit's decision allows such parents to treat the IEP process merely as a means to a government-funded private school education. This expansion of school districts' obligations under IDEA is in contravention of the statute and should be reversed.[3]

[2] While the Federal Government committed to funding 40 percent of the cost per pupil for special education when it first enacted the predecessor statute to IDEA in 1974, it currently funds less than 20 percent of those costs, creating a cumulative funding gap of more than $55 billion for the last four fiscal years. Ann Lordeman, *Individuals with Disabilities Education Act (IDEA): Current Funding Trends*, CRS Report for Congress (April 11, 2008). Even with the additional temporary funding to be provided under the American Recovery and Reinvestment Act of 2009, the gap will remain substantial.

[3] *Amici* also strongly support petitioner's argument that the question presented here must be decided in light of the obligations created under the Spending Clause which requires that "when Congress attaches conditions to a State's acceptance of federal funds" in IDEA, "the condition must be set out unambiguously." *Arlington Cent. Sch. Dist.*, 548 U.S. at 296 (internal quotations and citations omitted).

ARGUMENT

I. REQUIRING ALL PARENTS AND STUDENTS TO COMPLY WITH THE REQUIREMENTS OF SECTION 1412(a)(10)(C) IS CONSISTENT WITH THE PURPOSE AND STRUCTURE OF IDEA.

As part of its 1997 IDEA amendments, Congress sensibly adopted a threshold requirement for tuition reimbursement claims by parents who unilaterally place their children in private school: tuition reimbursement is only available for children who "previously received special education and related services under the authority" of the public school district. 20 U.S.C. § 1412(a)(10)(C)(ii). The plain language of this provision makes clear that where a child has not previously received special education from a school district, neither a court nor a hearing officer has authority to reimburse tuition expenses arising from a parent's unilateral placement of the child in private school. The amendment simply requires that parents of children with disabilities give public schools a realistic chance to serve their children before unilaterally rejecting what the public school offers—and forcing the school district to fund a private school education.

In addition to the threshold requirement, Congress determined that students who have previously received public special education services may be denied tuition reimbursement, in whole or in part, if the parents (1) failed to inform the student's IEP team that they were rejecting the proposed placement, (2) did not give written notice to the public agency ten days prior to removing the student from public school, (3) did not make the student

available for an evaluation, or (4) otherwise acted unreasonably. 20 U.S.C. § 1412(a)(10)(C)(iii). The Ninth Circuit concluded below not only that IDEA allows parents to receive tuition reimbursement for a disabled child who never received special education services from a public agency, but also that those parents are not subject to these statutory requirements.

The perverse outcome of this conclusion starkly demonstrates that the Ninth Circuit's interpretation of the law is flawed and inconsistent with the purposes and structure of IDEA. Under the Ninth Circuit's reading of the IDEA, parents who proceed consistently with IDEA's purpose and structure and in good faith place their disabled children in public school and work with the school to provide a free appropriate public education shoulder a greater burden when they determine that the public school is unable to serve their children than do parents who disregard IDEA's purpose and structure and never attempt to collaborate with the school district to develop an appropriate educational plan in a public school setting. This interpretation of the law, to favor parents of disabled students who never received special education services from a public school, ignores IDEA's fundamental goal of promoting public education for disabled students, seriously undermines IDEA's collaborative framework and disturbs the balance the Act seeks to strike between the interests of public schools and the interests of disabled students. Indeed, it is the Ninth Circuit's interpretation of the Act placing a greater burden on those parents who seek to cooperate with the school district—that leads to "absurd results" rather than the straight-forward application of Congress' clear language limiting tuition reimbursement to those situations where the student has previously received special education or related

services from a public entity.

A. IDEA's History and Fundamental Requirements Show that Appropriate *Public* School Placements are Preferred.

The principal motivating force behind IDEA and its predecessor was to stop the exclusion of disabled students from *public* schools—not to increase the opportunity for disabled children to attend private schools at public expense. In the 1970s "the majority of disabled children in America were 'either totally excluded from schools or sitting idly in regular classrooms awaiting the time when they were old enough to drop out.'" *Schaffer*, 546 U.S. at 52 (quoting H.R. Rep. No. 94-332, at 2 (1975)). Congress' findings from the 2004 IDEA reauthorization re-emphasize this fact. Before the enactment of IDEA and its precursor, "the educational needs of millions of children with disabilities were not being fully met because * * * the children were excluded entirely from the public school system and from being educated with their peers." 20 U.S.C. § 1400(c)(2).

The purpose of IDEA was "to reverse this history of neglect" and bring students with disabilities into the mainstream of the public school community. *Schaffer*, 546 U.S. at 52. This purpose is readily apparent: "the face of the statute evinces a congressional intent to bring previously excluded handicapped children into the *public education systems* of the States." *Rowley*, 458 U.S. at 189 (emphasis added).

The Act's "least restrictive environment" ("LRE") mandate, also known as its "mainstreaming" requirement, further underscores IDEA's goal of promoting public school access for children with disabilities. 20 U.S.C. § 1412(a)(5). Through this requirement, the Act incorporates a strong preference that, whenever possible, children with disabilities attend schools and classes with children who are not disabled—giving rise to "a presumption in favor of placement in the public schools." *T.F.* v. *Specialty Sch. Dist. of St. Louis County*, 449 F.3d 816, 820 (8th Cir. 2006) (parents not entitled to reimbursement for private school residential placement at annual cost of $100,000 where IEP offered a mix of services in public school and a private institutional setting).

Given this presumption, a school district may only resort to use of a private school to educate a child with a disability when "public educational services appropriate for the handicapped child are not available." *Hessler ex rel. Britt* v. *State Bd. of Educ.*, 700 F.2d 134, 138 (4th Cir. 1983). The public school has a duty to provide services to the student and to include the student in the public school community to the maximum extent practicable.

The Ninth Circuit's interpretation of IDEA, which advantages parents who never work with the public school district to attempt to include their disabled child in a public school program tailored to their child's needs, is contrary to the well-established preference in the IDEA for public schooling of disabled children wherever possible. Indeed, it eviscerates the LRE mandate by allowing parents to obtain public funding for a private school placement without ever trying the public school program.

B. IDEA Establishes a Collaborative Framework for Parents and Public Schools to Work in Tandem to Ensure Appropriate Educational Programs for Children with Disabilities.

The "core of [IDEA] * * * is the cooperative process that it establishes between parents and schools." *Schaffer*, 546 U.S. at 53. *See also Rowley*, 458 U.S. at 205-206 (Congress gave "parents and guardians a large measure of participation at every stage of the administrative process"). The collaborative decision-making process at the heart of IDEA is undermined when parents do not cooperate in good faith with school districts. Congress' decision to require parents at least to attempt to ensure an appropriate public school placement before they are eligible for private school tuition reimbursement fosters just such good-faith collaboration. The Ninth Circuit's interpretation of IDEA, however, will encourage parents not to collaborate with public school districts because to do so will disadvantage them if they later seek private-school tuition reimbursement.

As the Court recently stated in *Schaffer*, the "central vehicle for this collaboration is the IEP process," and parents and guardians "play a significant role" in the process. 546 U.S. at 53. From its very outset, for each individual child, the content of an appropriate education is defined collectively in an IEP by a team that includes (among others) the parents and teachers of the student. *See* 20 U.S.C. § 1414(d); *Honig* v. *Doe*, 484 U.S. 305, 311 (1988). Likewise, the determination of whether a student is disabled as defined by the Act and therefore entitled to special education services, is made by "a team of qualified professionals and the parent of the child." 20 U.S.C. § 1414(b)(4).

Parents are also involved in an ongoing process of evaluating the implementation of the child's educational program and revising IEPs. Whenever parents believe during a school year that their child's IEP requires revision because of, for example, "any lack of expected progress" or "the child's anticipated needs," they may request that the IEP team review the IEP and consider revising it to meet the child's needs. 20 U.S.C. § 1414(d)(4)(A). Or the parents and the school district may agree to develop a written document amending the IEP during the school year without convening an IEP meeting. 20 U.S.C. § 1414(d)(3)(D). And at least annually the whole IEP team, including the parents, formally reviews whether the plan's goals are being achieved and revises the IEP as needed. 20 U.S.C. § 1414(d)(4)(A). The team also considers the results of reevaluations of the child and other new information about the child and his or her needs, including any such information submitted by the parents. 20 U.S.C. § 1414(d)(3-4).

When a child has never received special education services from the public school system, requiring parents to request an evaluation before placing their child in private school—to determine whether their child is disabled and eligible for services under the IDEA is entirely consistent with the collaborative model established in the IDEA. Likewise, requiring parents at least to try the services recommended by an IEP team before rejecting them in favor of a private placement furthers this collaborative model. Indeed, parents who actually try the individualized education program offered by the public school may find that it meets their child's educational needs. Moreover, requiring parents to work in good faith with school staff recognizes that providing a free appropriate public education to any given child may require an ongoing process of adaptation. *See, e.g.*,

Honig, 484 U.S. at 321 (referring to "inescapable fact that the preparation of an IEP * * * is an inexact science at best"). By contrast, to allow parents to obtain tuition reimbursement where, as here, they initially agreed that their child was ineligible for special education, only to later request an evaluation and a due process hearing after removing the child from public school, would belittle both the cooperative approach of IDEA and the complexity of educating disabled students.

IDEA's emphasis on prompt cooperative solutions imposes obligations on school districts and parents alike to ensure their good faith commitment to a truly collaborative process. The 1997 IDEA amendments, for example, included a number of provisions that made some of the procedural duties of parents quite explicit. Requiring cooperation in these smaller ways would make little sense if the Act entitles parents who abandon public schools before even challenging whether their child was eligible for services, or who reject a proposed placement without trying the services offered by the public school district, to receive tuition reimbursement.

The 1997 amendments, for example, added a provision indicating that reimbursement may be denied or reduced if the parents do not give the school district notice of their intent to remove a child from public school before they do so. 20 U.S.C. § 1412(a)(10)(C)(iii)(I). Therefore, before removing a child from a public school, parents must inform the IEP team that they are rejecting the proposed placement, state their concerns with the proposal, and indicate their intent to enroll their child in a private school at public expense. 34 C.F.R. § 300.148(d). In addition, parents must give the school district written notice of these factors at least

ten days prior to removing their child from a public school. *Id.* The reason for this is clear: Without a good faith commitment to the process by all parties, true collaboration in determining the development and implementation of a free appropriate public education would not be possible. *See, e.g., M.S. ex rel. M.S.* v. *Mullica Twp. Bd. of Educ.*, No. 06-533, 2007 WL 1096804 (D.N.J. Apr. 12, 2007), *aff'd*, 263 F. App'x 264 (3d Cir. 2008) (parents' refusal to cooperate prevented creation of appropriate IEP). If rejecting a placement requires timely notice and a list of reasons to ensure a collaborative process, then not even attempting to secure services under IDEA before removing the child from public school is the antithesis of this collaborative process.

School districts, too, share an obligation under the Act to attempt in good faith to identify and evaluate children in need of special education and to negotiate workable IEPs and to agree to private placements when they cannot. School districts frequently agree to private placements where they are unable to provide an appropriate educational program themselves. *See* 20 U.S.C. § 1412(a)(10)(B). In 2005, for example, there were 88,098 students with disabilities educated in private schools at public expense. *See* U.S. Department of Education, IDEA data, Table 2-5: Number of students ages 6 through 21 served under IDEA, Part B, in the U.S. and outlying areas, by disability category and educational environment, Fall 1996 through Fall 2005, *available at* https://www.ideadata.org/tables29th/ar_2-5.htm [hereinafter IDEA data]. The overwhelming majority of these placements were ones that school districts agreed were appropriate to ensure the child in question received the education mandated by IDEA. School districts thus voluntarily expend hundreds of millions of dollars in state and local revenue on agreed private placements--which

occur when the collaborative process established by the Act is operating as it is intended.

C. IDEA Provides Numerous Effective Procedural Protections to Parents and Students that Ensure Quality Education and Prevent "Absurd Results."

The fundamental goal of IDEA is a "free appropriate public education" in the "least restrictive environment" for all students with disabilities. 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(5). IDEA establishes procedural rights and obligations for parents and school districts alike to achieve that goal in a manner that ensures educational opportunities for disabled children while recognizing the financial costs entailed. *See Arlington Cent. Sch. Dist.*, 548 U.S. at 303 ("the IDEA is not intended in all instances to further [its] broad goals * * * at the expense of fiscal considerations"). To require school districts to reimburse the cost of private school tuition without first affording the district the opportunity to provide special education and related services ignores the equally important interests of school districts and parents that IDEA seeks to balance through carefully constructed procedural rights and obligations.

The Act imposes numerous procedural obligations on public school districts to ensure prompt resolution of disputes, in the event that the collaborative approach is unsuccessful. Under IDEA, school districts must respond to parents' complaints within a short timeframe. Indeed, since the adoption of Section 1412(a)(10)(C)(ii), Congress has tightened the deadlines for school districts. For example, when a school district receives notice of a due process

complaint, it has only ten days to explain to the parents why it has proposed or refused to take the action at issue. 20 U.S.C. § 1415(c)(2)(B)(i)(I). Within 15 days, the school district must convene a meeting with the parents and relevant IEP team members, at which the parents and child are given an opportunity to discuss their complaint and try to resolve the dispute amicably. *Id.* § 1415(f)(1)(B). If the complaint is not fully resolved within 30 days, a due process hearing must be scheduled. *Id.* The Act also provides parents and guardians with a right to publicly funded, confidential mediation. *Id.* § 1415(e). All these protections apply both to parents who are challenging an IEP, and to parents who dispute the school district's determination that a child is not eligible for special education services.

Likewise, the 1997 IDEA amendments that explicitly place certain procedural duties on parents, also further prompt dispute resolution through a collaborative method whenever possible. For example, the 1997 amendments specify that private school tuition reimbursement may be denied or reduced if the parents do not give the school district notice of their intent to remove a child from public school before they do so. *See* 20 U.S.C. § 1412(a)(10)(C)(iii)(I); 34 C.F.R. § 300.148(d). These procedural safeguards emphasize that school districts should be given an opportunity to provide a free appropriate public education before parents are able to obtain tuition reimbursement for a unilateral private school placement.

The Ninth Circuit found that interpreting section 1412(a)(10)(C) to apply to all parents including those who remove their children from public school before the school district identifies them as disabled pursuant to IDEA—would lead to "absurd result[s]"

because the "student would *never* receive special education in public school and therefore would *never* be eligible for reimbursement under § 1412(a)(10)(C)(ii)." *Forest Grove Sch. Dist.*, 523 F.3d at 1087. The Ninth Circuit's conclusion that it is absurd to apply the plain language of the IDEA to all parents seeking a publicly funded private education is incorrect. First of all, the IDEA provides parents, like those of T.A., with a procedural avenue to obtain prompt review of the school district's eligibility determinations. For example, T.A.'s parents could have challenged the school district's determination that T.A. was not disabled when he was attending public school in June of 2001. Had the parents requested a due process hearing at that time, an impartial hearing officer could have found that the school district erred in its eligibility determination and required the school district to prepare an IEP for T.A. by the fall of 2001 the beginning of T.A.'s tenth-grade school year. *See* 34 C.F.R. §§ 300.510(b)(1)-(2), 300.515(a) (hearing officer must issue decision within 45 days of 30-day period following filing of due process complaint). If T.A.'s parents remained dissatisfied with that IEP after giving it an opportunity to work, and they met the additional provisions Congress included in § 1412(a)(10)(C)(iii), they would then be eligible for tuition reimbursement if the hearing officer (or the federal courts) subsequently determined that the proposed IEP was not reasonably calculated to provide FAPE. If T.A.'s parents made such a showing to the hearing officer, they potentially could have been eligible for tuition reimbursement by mid-way through T.A.'s tenth-grade year.[4]

[4] No due process hearing was requested by the parents in 2001, however, because T.A.'s mother *agreed* with the school district

Second, there is nothing "absurd" in interpreting the plain language of the IDEA to require that parents work cooperatively with school districts before being eligible for tuition reimbursement, and that such cooperation is required prior to obtaining private school tuition reimbursement, even where the student has not been identified for special education services by the school district before the parents unilaterally remove him from the public schools. Among the bedrock principles of the IDEA is that it presumes that school district officials are the experts in educational matters and their judgment in such matters is due deference by the courts. *See Schaffer*, 546 U.S. at 59 ("IDEA relies heavily upon the expertise of school districts to meet its goals"); *id.* at 62-63 (Stevens, J., concurring) ("I believe that we should presume that public school officials are properly performing their difficult responsibilities under this important statute"). That deference here translates into presuming that a school district that finds a student ineligible for special education services has done so in good faith, applying its best professional judgment. Similarly, requiring parents of children who have been found eligible for services to work with the school district to develop and try an IEP before obtaining a publicly funded private education is completely consistent with IDEA's collaborative process and the deference owed to the professional judgment of educators, who are entitled to this presumption of good faith.

that he did not "have a learning disability and * * * was ineligible for special education." Pet. App. 39a n.3 (quoting Exhibit 1 to Amended Complaint). Of course, T.A.'s parents could have challenged not only the school district's 2001 determination of eligibility but also could have challenged the areas in which the school district assessed T.A. in making its determination. *See* 20 U.S.C. § 1414(b)(3)(B).

Indeed, interpreting IDEA to not apply the limits in § 1412(a)(10)(C) to parents and students who never receive special education or related services from a public entity leads to absurd results because it flouts the IDEA's procedural safeguards and the balance IDEA seeks to achieve. Such an interpretation would place more statutory requirements for private school tuition reimbursement on parents who have worked with the public school system to obtain special education services from a school district than on those who have never attempted the collaboration required by the statute. Such an interpretation can only encourage parents not to work within the framework of IDEA to develop a plan for a free appropriate public education for their disabled children. Such a message is completely antithetical to Congress' intent. *See Schaffer*, 546 U.S. at 60 ("Congress appears to have presumed * * * that, if the Act's procedural requirements are respected, parents will prevail when they have legitimate grievances.") (citing *Rowley*, 458 U.S. at 206).

II. THE NINTH CIRCUIT'S RULING DISTORTS THE DISPUTE RESOLUTION PROCESS UNDER IDEA AND DISRUPTS EFFECTIVE ADMINISTRATION OF SPECIAL EDUCATION SERVICES.

A. Parents Would Obtain an Unfair Litigation Advantage by Refusing to Give School Districts an Opportunity to Attempt to Provide a Free Appropriate Public Education.

The advantages provided by an interpretation of IDEA that permits parents to obtain private school

tuition reimbursement when they unilaterally place their child in private school without first receiving special education services from the public school district go beyond those parents' ability to avoid procedural requirements in IDEA with which parents whose children have received public special education services must comply. As a practical matter, parents whose children have not received public special education services will also benefit from an advantage in any later administrative proceeding or litigation with the school district.

Under an interpretation of IDEA that provides that parents whose children never obtained special education or related services from a public agency need not comply with any of the requirements of § 1412(a)(10)(C), the school district will sometimes not even have the opportunity to evaluate the child, much less develop an IEP, until after the child is in a private school, because parents will not have to give notice that they intend to place their child in a private school. The ensuing evaluation and any development of an IEP inevitably would occur under an adversarial shadow, with the parents' rejection of any determination of ineligibility or offer of an IEP public placement already set and the occurrence of a due process hearing a foregone conclusion.

Under such circumstances, a school district knows that any determination that the child is ineligible for special education services will place it in an extremely weak position should the independent hearing officer disagree. It will not only be found to have denied FAPE by its ineligibility finding but also will not have developed an IEP that can be examined to determine the appropriateness of a public placement and offered services.

Where the school district has already determined prior to the parents' unilateral removal that a child is eligible for special education, unilateral refusal by parents to try an IEP means that school officials are never given the opportunity to make (or refuse to make) changes depending on how a child responds to the IEP that was developed. If a problem with the IEP becomes apparent, school districts need to be able to investigate and respond to the problem—before being saddled with tens of thousands of dollars in tuition reimbursement. *See M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996) (district "may not be able to act immediately to correct an inappropriate IEP; it may require some time to respond to a complex problem"). Moreover, in some circumstances, a school district not only should have the opportunity but also may have the duty to try a less restrictive public school placement before agreeing to a more restrictive private school setting. *See, e.g., T.F.*, 449 F.3d at 821 ("district should have had the opportunity, and to an extent had the duty, to try these less restrictive alternatives before recommending a residential placement").

When parents unilaterally place their child in a private school without determining whether their child is even eligible for an IEP, or before implementation of a collaboratively developed IEP, school districts are thus denied the ability to litigate the case on an even footing with the parents. Parents challenging an IEP have the burden to prove that a school district's proposed public placement is inadequate under IDEA, *Schaffer*, 546 U.S. at 62, but the distinct evidentiary advantage that the parents' action provides them tempers such burden. For example, where eligibility is contested, the due process hearing officer will be weighing the district's determination of ineligibility, (*i.e.*, its intent to offer

no special education services), against the parents' claim that their child is in need of services as reinforced by evidence of how well the child is doing while receiving the panoply of services available at the private placement. Where eligibility is not at issue, the hearing officer is forced to evaluate in a vacuum whether the IEP is reasonably calculated to provide some educational benefit to the child because the child has no experience with the public school educational plan. This necessitates an abstract inquiry. Although an IEP is supposed to be judged prospectively as of the time it was developed, in many cases, the parents point precisely to how the child is doing in the private placement as some sort of "proof" of their speculation that the public placement was insufficient. *See, e.g., Konkel v. Elmbrook Sch. Dist.*, 348 F. Supp. 2d 1018, 1023 (E.D. Wis. 2004); *Justin G. ex rel. Gene R.* v. *Bd. of Educ. of Montgomery County*, 148 F. Supp. 2d 576 (D. Md. 2001). In addition to encouraging improper "Monday morning quarterbacking" of the IEP developed by the public school, the parent's "proof" of private school success is meaningless in the absence of having tried the public placement.

The Ninth Circuit's interpretation of IDEA thus allows, and even encourages, parents and their attorneys to sit back and never even try to obtain an IEP in hopes that the school district members of an IEP team will, in the opinion of a hearing officer, incorrectly conclude their child is not disabled. In such a situation, the school district is not given the opportunity to produce an IEP and demonstrate that it would work; rather, the parents effectively need only show that the private placement is appropriate. At a minimum, parents and their attorneys will be more able to convince a hearing officer or administrative law judge that the school district's determinations were incorrect, a process made easier

by asking the hearing officer to compare the school district's proposed program, or lack thereof, to the private school's actual program. In contrast, for a student who has attended the public schools, has gone through the evaluation process, been identified as disabled, and has tried the IEP proposed by the school district, the school district will be able to provide evidence at an administrative hearing of its actual efforts with the student, including the modifications it has made in response to concerns expressed by the parents, rather than just a written evaluation or IEP on a piece of paper. It cannot be that in amending IDEA to include § 1412(a)(10)(C), Congress intended to provide such an advantage to families who never try to work with the public school system in obtaining public special education services for their children through the IDEA.

B. Allowing Unilateral Private Placements for Students Who Never Have Received Special Education Services from a Public School Undermines School Districts' Ability to Accurately Budget for and Provide Special Education Services.

The Ninth Circuit's interpretation of IDEA also hampers school districts' ability to provide appropriate special educational services to public school students. By encouraging unforeseeable unilateral private school placements, the decision below would undermine school districts' already difficult budgeting process.

Budgeting for special education services is already

a difficult process.[5] These costs have been described as the "wild cards in school district budgets," because they are based on particular needs of specific students and can change from year to year. Melanie Asmar, *Special Education Costs Soar; Unpredictable Bill Can Strain Local Districts,* Concord Monitor, Feb. 17, 2008. In addition, the costs of private placements for special education students can be particularly expensive. While the residential program for which respondent sought reimbursement here cost more than $5,000 per month or approximately $45,000 per year costs for some private placements can be "as much as $100,000 per year." *Id.* As one superintendent explained, "You really can have just a few very high-cost students come into your district and have a huge impact on your cost per pupil." Meaghan M. McDermott, *Special Ed*, Rochester Democrat and Chronicle, Dec. 2, 2007, at 1A.

The Ninth Circuit's ruling that § 1412(a)(10)(C) does not apply to a student who never received special education services from a public school district makes an already difficult budgeting process for public school districts even more unpredictable. School districts are simply unable to estimate possible costs associated with private placements where they have no means of determining the number of students who might be eligible for private school reimbursement, and where decisions as to whether or not reimbursement is appropriate are based on indeterminate notions of equity rather than

[5] School districts spend more than $6.7 billion annually on assessments, evaluations, and IEP-related activities alone. *See* Jay G. Chambers, *et al.*, American Institutes for Research, *What Are We Spending on Special Education Services in the United States, 1999-2000, Rpt. 1* at 13-14 (June 2004), *available at* http://csef.air.org/publications/seep/national/AdvRpt1.pdf.

statutory rules and procedures. Rather than having advance notice and an opportunity to plan ahead in budgeting for a student whom the public school district has attempted to serve, the Ninth Circuit rule means that school districts will be hit after-the-fact with potentially large tuition reimbursement claims for private placements of students who the school district did not even know might require such services.

The budgeting challenges in this case exemplify the problem. How could the school district have suspected in 2001, after T.A.'s mother *agreed* with the district that he was ineligible for special education services, or even in March of 2003, when the district assisted T.A.'s father in arranging a placement at Portland Community College while T.A. was dealing with drug problems, that later in 2003, T.A. would be in a residential placement costing $45,000 a year for ADHD?

III. PERMITTING REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENTS MADE BEFORE THE CHILD EVER RECEIVES SPECIAL EDUCATION SERVICES FROM A PUBLIC SCHOOL WOULD INCREASE LITIGATION COSTS AND DIVERT RESOURCES FROM EDUCATION.

A. Litigation Costs Under IDEA Are High.

Litigation costs under IDEA are often prohibitive for school districts. In 1999-2000, the average cost of a litigated case was $94,600 for the year. Jay G. Chambers, *et al.*, American Institutes for Research, *What Are We Spending on Procedural Safeguards in Special Education, 1999-2000, Rpt. 4* at 8 (May

2003), *available at http://csef.air.org/publications/SEEP/national/Procedural%20Safeguards.pdf* [hereinafter Chambers, Procedural Safeguards]. Congress is aware of this problem and has been trying to rein in these costs. As a Senate Report from the 1997 amendments makes clear, "[t]he growing body of litigation surrounding IDEA is one of the unintended and costly consequences of this law." S. Rep. No. 104-275, at 85 (1996).

Yet school districts are pushed to litigate as more and more parents seek reimbursement for expensive private school placements for their children. The costs of reimbursing parents for private school placements, such as respondents seek here, average more than $26,000 per student–more than four times the cost of public placements. U.S. Dep't of Educ., *Twenty-fourth Annual Report to Congress on the Implementation of IDEA*, I-30 to I-31 (2002). And in roughly the last decade, the number of private placements has increased at more than *twice* the pace that the number of special education students has increased. According to the United States Department of Education, 88,098 students with disabilities were educated in private schools at public expense in 2005. From 1996-2005, while the number of children ages 6-21 who receive special education and related services for all disabilities rose by 17% across the Nation, the number of children in publicly funded private placements rose by over 34%. *See* IDEA data, *supra*, at Table 2-5.

Even if parents and the school district can resolve conflicts regarding special education services prior to litigation, due process hearings and mediations themselves add significant costs to school districts' special education budgets. In 1998-1999, more than 6,750 due process hearings and 4,250 mediations were held. *See* Chambers, Procedural Safeguards,

supra, at 8. And on average, schools spent $8,160-$12,200 for *each* due process hearing or mediation. *Id.* Given that the average per pupil expenditure for special education services is about $8,000, a due process hearing or mediation effectively doubles a school district's cost to educate a single disabled child. *See id.* at 3; U.S. Dep't of Educ., *Twenty-fourth Annual Report to Congress on the Implementation of the IDEA*, I-22, I-26 (2002).

School districts do not engage in these expensive disputes to avoid providing appropriate education to special needs students; indeed, more than 55% of resolved due process hearings and litigation cases are decided entirely in favor of the school district, while 65% of due process hearings and 83% of litigation cases result in at least a partial victory for the district. *See* Chambers, Procedural Safeguards, *supra*, at 20. Every dollar a school district spends on private placements and litigation to avoid unnecessary private placements is a dollar less for providing special education and related services to students in the public schools. Under certain circumstances, private placements and related costs to the school district may be appropriate, but the costs of special education supports an interpretation of IDEA that does not encourage parents to avoid IDEA's collaborative framework and to sue the school district for private school reimbursement.

B. The Ninth Circuit's Decision Will Encourage Litigation.

The 2004 amendments contain several provisions designed to "[r]estor[e] trust and reduc[e] litigation" under IDEA and to alleviate the "excessive litigation under the Act." H.R. Rep. No. 108-77, at 85, 116 (2003). *See, e.g.*, 20 U.S.C. § 1415(b)(7)(A) (notice

requirements for complaints); 20 U.S.C. § 1415(b)(6)(B) (statute of limitations); 20 U.S.C. § 1415(e) (mediation and nonbinding arbitration); 20 U.S.C. § 1415(i)(3)(B) (attorney's fees for frivolous claims); H.R. Rep. No. 108-77, at 85-86 (discussing new provisions). But ruling that *Burlington School Committee* v. *Department of Education*, 471 U.S. 359 (1985), and *Florence County School District Four* v. *Carter*, 510 U.S. 7 (1993), are not limited by Section 1412(a)(10)(C)(ii) would only result in a continued flood of private school parents seeking to play in a tuition-reimbursement lottery, regardless of their interest (or lack thereof) in securing a public education for their children. It would place school districts nationwide, many of them small and financially strapped, in the untenable position of being forced to choose between an expensive private school placement on the one hand and costly litigation on the other.

The reality is that the Court's holdings in *Burlington* and *Carter* exploded the number of tuition reimbursement cases that school districts must litigate, mediate, or settle. And if parents are free to unilaterally place their children in private schools and then seek reimbursement, without ever trying the public school's program (or in this case, even requesting an evaluation, informing the school of an alleged deficiency under IDEA or working with the school to create an individualized program), that number will expand exponentially. IDEA is intended to ensure a free and appropriate *public* education for students with disabilities resort to a private placement is permissible only in extraordinary circumstances. Allowing private tuition reimbursement in cases where the child has not previously received special education services in the public schools would work against the intent of the Act, forcing school districts into a no-win choice

between expensive litigation and expensive private placements and offering windfalls to parents who prefer private schools.

CONCLUSION

For the foregoing reasons, as well as those stated by petitioner, *amici* respectfully request that this Court reverse the decision of the Ninth Circuit.

Respectfully submitted,

Of Counsel:
FRANCISCO M. NEGRÓN, JR.
GENERAL COUNSEL
NAOMI GITTINS
NATIONAL SCHOOL BOARDS ASSOCIATION
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722
* Counsel of Record

MAREE F. SNEED*
JOHN W. BORKOWSKI
AUDREY J. ANDERSON
STEPHANIE J. GOLD
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
Counsel for Amici Curiae

March 4, 2009

AMICUS CURIAE BRIEF

122

No. 08-305

Supreme Court, U.S.
FILED
MAR 3 - 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,

Petitioner,

v.

T.A.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* NEW YORK STATE SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

JAY WORONA
(*Counsel of Record*)
PILAR SOKOL
NEW YORK STATE SCHOOL
BOARDS ASSN.
24 Century Hill Drive, Suite 200
Latham, New York 12110-2125
(518) 783-0200

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

3:4 405K36

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. Under The Plain Language Of 20 U.S.C. §1412(a)(10)(C)(ii) A Parent's Right To Reimbursement Under The IDEA Depends On Both A School District's Failure To Make A FAPE Available And Their Child Having Previously Received Special Education And Related Services Under The Authority Of A Public Agency 5

A. The Language Of 20 U.S.C. §1412(a)(10)(C)(ii) Is Not Ambiguous 7

B. The Limitation Imposed By 20 U.S.C. §1412(a)(10)(C)(ii) On A Parent's Right To Reimbursement Is A Proper Exercise Of Congressional Authority 8

C. Enforcement Of The Plain Language Of 20 U.S.C. §1412(a)(10)(C)(ii) Will Not Produce An Absurd Result 13

II. The History Of 20 U.S.C. §1412(a)(10)(C)(ii) Supports Enforcement Of Its Plain Language 15

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES:

Arlington Central Sch. Dist. Board of Educ. v. Murphy, 548 U.S. 291 (2006).....6, 9, 15, 16

Board of Educ. of City Sch. Dist. of City of New York v. Tom F., 2005 WL 22866 (S.D.N.Y. 2005).....14

Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176 (1982).....9, 12

Burlington Sch. Comm. v. Dep't of Educ., 471 U.S. 359 (1985).....3, 16

Caminetti v. United States, 242 U.S. 470 (1917).....6

Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993).....3

Forest Grove School Dist. v. T.A., 523 F.3d 1078 (9th Cir. 2009).....3, 7, 9, 14

Harris v. McRae, 448 U.S. 297 (1980).....7, 10, 13

Hartford Underwriters Insurance Company v. Union Planters Bank, N.A., 530 U.S. 1 (2000).....7

Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983).....6, 10, 13

Schaffer v. Weast, 546 U.S. 49 (2005).....9

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989).....13

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND REGULATIONS:

20 U.S.C. §1400 *et seq.* 1
20 U.S.C. §1412 9
20 U.S.C. §1412(a)(10).....4, 8, 11
former 20 U.S.C. §1412(a)(10)(A)(i) 12, 17
20 U.S.C. §1412(a)(10)(A)(iii).....18
20 U.S.C. §1412(a)(10)(C).....3, 4, 8
20 U.S.C. §1412(a)(10)(C)(i) 6
20 U.S.C. §1412(a)(10)(C)(ii) .....*passim*
20 U.S.C. §1412(a)(10)(C)(iii).....4
20 U.S.C. §1413 9
former 20 U.S.C. §1413(a) 10
former 20 U.S.C. §1413(a)(4).....11
former 20 U.S.C. §1413(a)(4)(A).....10, 11
former 20 U.S.C. §1413(a)(4)(B).....10, 11
20 U.S.C. §1414 9
20 U.S.C. §1415 9
20 U.S.C. §1415(b)(6).....14
20 U.S.C. §1415(i)(2)(C)(iii).....3
34 C.F.R. §§300.130-150 18
former 34 C.F.R. §300.454(a)(1) 17
former 34 C.F.R. §300.454(a)(2) 18
former 34 C.F.R. §300.454(b).....18

TABLE OF AUTHORITIES – Continued

Page

former 34 C.F.R. §300.454(c) 18

former 34 C.F.R. §300.455(a)(2) 17

former 34 C.F.R. §300.455(a)(3) 17

former 34 C.F.R. §300.457 .....17, 18

OTHER:

S. Rep. 105-17 (1997 WL 244967).....13, 15, 16

H.R. Rep. 105-95 (1997 U.S.C.C.A.N. 78).....13, 15, 16

INTEREST OF THE *AMICUS CURIAE*[1]

The New York State School Boards Association, Inc. ("NYSSBA") is a not-for-profit membership organization incorporated under the laws of the State of New York. Its membership consists of approximately ninety-three percent (93%) of all public school districts in New York State. Pursuant to Section 1618 of New York's Education Law, NYSSBA has the responsibility of devising practical ways and means for obtaining greater economy and efficiency in the administration of the affairs and projects of New York's public school districts. NYSSBA often appears as *amicus curiae* before both federal and state court proceedings involving constitutional and statutory issues affecting public schools, including the education of children with disabilities, and indeed has done so previously before this Court. NYSSBA fully supports the rights of disabled children. However, NYSSBA has a significant interest in ensuring that its members are not subjected to obligations related to the education of children with disabilities that exceed those specifically set forth in the Individuals with Disabilities Education Act, 20 U.S.C. §1400

---

[1] The parties consented to the filing of this brief, and copies of the parties' written consents have been filed with the Clerk of the Court. This brief was not authored in any part by counsel for either party, and no person or entity other than the *Amicus*, its members or counsel made a monetary contribution to the preparation or submission of this brief.

et seq. ("IDEA"). Special education services are costly,[2] and federal financial assistance made available by the IDEA is insufficient to cover the cost of special education. NYSSBA members, like many other school districts across this country, regularly expend often scarce local financial and other resources to fully comply with their IDEA obligations, which frequently limit the type of educational choices they can afford to offer their students, including children with disabilities. A decision by this Court in favor of the respondent would impose an added financial liability on school districts that would limit the educational choices NYSSBA members could afford to offer all of their students.

---

[2] In New York alone, an examination of the most recent available data contained within The New York State School Report Card that school districts in the state must submit to the New York State Education Department reveals that during the 2004-05 school year, the average expenditure of all public schools in New York State for special education was $19,320 as compared to $8,787 for general education students. During the 2005-06 school year those figures increased to $22,354 for special education and $9,168 for general education students. The most recent student count data available from the New York State Education Department further indicates that on December 1, 2007 there were a total of 409,856 school age children ages 4-21 receiving special education programs and services.

SUMMARY OF THE ARGUMENT

The issue before this Court is whether 20 U.S.C. §1412(a)(10)(C)(ii) limits the availability of tuition reimbursement as a remedy under the IDEA only to parents of children with disabilities "who previously received special education and related services under the authority of a public agency. . . ." When asked the same question, the U.S. Court of Appeals for the Ninth Circuit, whose decision in *Forest Grove School Dist. v. T.A.*, 523 F.3d 1078 (9th Cir. 2009), is on appeal herein, answered no.

This Court first recognized a parent's right to tuition reimbursement under the IDEA in its 1985 decision in *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985), based on the statute's grant of authority to courts to award "such relief as the court determines is appropriate" under section 1415(e)(2), currently codified at 20 U.S.C. §1415(i)(2)(C)(iii). It later expanded this right in *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993), ruling that a parent's choice of a private school that does not meet state educational standards does not impede the ability to obtain such relief.

In the time since, Congress has reauthorized the IDEA twice, first in 1997 and, more recently, in 2004. During the 1997 reauthorization, Congress amended the IDEA to explicitly provide a statutory right to reimbursement (20 U.S.C. §1412(a)(10)(C)). Nothing in the 2004 reauthorization materially affects that right.

The language at issue herein first appeared in the 1997 version of the IDEA within a paragraph entitled "Children in Private Schools" (20 U.S.C. §1412(a)(10)). It is part of a subparagraph entitled "Payment For Education Of Children Enrolled In Private Schools Without Consent Of Or Referral By The Public Agency" (20 U.S.C. §1412(a)(10)(C)). That subparagraph further addresses the topics of "Reimbursement For Private School Placement" (20 U.S.C. §1412(a)(10)(C)(ii)), and "Limitation On Reimbursement" (20 U.S.C. §1412(a)(10)(C)(iii)). The 2004 reauthorization did not change this statutory structure.

The plain text of the contested language and its contextual framework make clear that the previous receipt of special education and related services under the authority of a public agency is a condition precedent to the recovery of reimbursement as a remedy under the IDEA when a school district fails to make a FAPE available. The limitation constitutes a proper exercise of congressional authority and discretion to determine who may benefit from its laws.

Even if the language of 20 U.S.C. §1412(a)(10)(C)(ii) is deemed to be ambiguous, further support for a literal interpretation thereof is found in the history of its incorporation into the IDEA. That history clearly establishes a congressional intent, continued in the 2004 reauthorization, to restrict and refine the IDEA rights of children unilaterally enrolled by their parents in private school, and the rights of their parents.

The decision of the Ninth Circuit in this case should be reversed.

ARGUMENT

I. Under The Plain Language Of 20 U.S.C. §1412(a)(10)(C)(ii) A Parent's Right To Reimbursement Under The IDEA Depends On Both A School District's Failure To Make A FAPE Available And Their Child Having Previously Received Special Education And Related Services Under The Authority Of A Public Agency.

The IDEA provisions that set forth a parent's statutory right to reimbursement under that law read, in relevant part, as follows:

> (C) PAYMENT FOR EDUCATION OF CHILDREN ENROLLED IN PRIVATE SCHOOLS WITHOUT CONSENT OF OR REFERRAL BY THE PUBLIC AGENCY
>
> (i) IN GENERAL – Subject to subparagraph (A), this part does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child in such private school or facility.
>
> (ii) REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT – If the parents of a child with a disability, **who**

> **previously received special education and related services under the authority of a public agency**, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment (20 U.S.C. §1412(a)(10)(C)(i),(ii)) (emphasis added).

The bolded text highlights the specific language in controversy. First introduced during the 1997 reauthorization of the IDEA, the above quoted provisions were unchanged by the 2004 reauthorization.

As this Court explained in *Arlington Central Sch. Dist. Board of Educ. v. Murphy*, it must be presumed that the language of the IDEA expresses what Congress intended it to say, and means what it says (548 U.S. 291, 296 (2006)). This Court has also held that, generally, statutory words are to be given the natural meaning commonly attributed to them (*see*, e.g., *Caminetti v. United States*, 242 U.S. 470, 485-86 (1917)). An exception would apply if the plain language of a statute is susceptible to more than one meaning (*Id.*, at 485), or if the disposition required by the statutory language is absurd (548 U.S. at 296-97). Otherwise, the policy choices articulated by Congress in the language of a statute must be upheld, regardless of the wisdom of those choices (*Regan v. Taxation*

with Representation of Washington, 461 U.S. 540, 548-49 (1983); *Harris v. McRae*, 448 U.S. 297, 326 (1980)).

According to the Ninth Circuit, whose decision is the subject of the appeal before this Court, the language of 20 U.S.C. §1412(a)(10)(C)(ii) is not only ambiguous but also inconsistent with the overarching purpose of the IDEA and other provisions of the statute. For the reasons that follow, the *Amicus* respectfully disagrees and urges this Court to reverse the Ninth Circuit's decision and enforce the plain language of the statute.

A. The Language Of 20 U.S.C. §1412(a)(10)(C)(ii) Is Not Ambiguous.

The Ninth Circuit determined that the statutory language at issue herein is ambiguous because "its text does not *clearly* create a categorical bar . . . " to tuition reimbursement when a child has not previously received special education services from a public school (*Forest Grove School Dist. v. T.A.*, 523 F.3d at 1086). However, the natural reading of 20 U.S.C. §1412(a)(10)(C)(ii) is plainly discernable from both the common meaning of its words and its contextual features. Therefore, the statute's plain language is unambiguous and enforceable (*see*, *Hartford Underwriters Insurance Company v. Union Planters Bank, N.A.*, 530 U.S. 1, 7-8 (2000)).

First incorporated into the IDEA during the 1997 reauthorization of the statute, the contested language

appears in a subparagraph entitled "Payment For Education Of Children Enrolled In Private Schools Without Consent Of Or Referral By The Public Agency," (20 U.S.C. §1412(a)(10)(C)). Moreover, it is part of a paragraph that expressly sets forth the rights of "Children in Private Schools" (20 U.S.C. §1412(a)(10)).

It is without question that the statutory framework within which Congress incorporated the language at issue herein defines both the right of children in private schools to receive IDEA services and the right of parents who unilaterally place their children in private school to obtain tuition reimbursement as a remedy under the statute. 20 U.S.C. §1412(a)(10)(C)(ii) must be read within this larger structure, rather than in isolation. From that view, the language at issue makes clear that a parent's right to recover reimbursement as a remedy under the IDEA depends both on a district's failure to make a FAPE available, and their child's previous receipt of special education and related services under the authority of a public agency.

B. The Limitation Imposed By 20 U.S.C. §1412(a)(10)(C)(ii) On A Parent's Right To Reimbursement Is A Proper Exercise Of Congressional Authority.

The Ninth Circuit also determined that interpreting the statutory language at issue herein to

create a categorical bar to reimbursement as a remedy under the IDEA would be contrary to "the broader context of the statute . . . to give children with disabilities an *appropriate* and *free* education . . . [and] produce a substantive effect that is [in]compatible with the rest of the law" (523 F.3d 1078 at 1086).

However, as this Court has observed on more than one occasion, the IDEA is a funding statute (*Arlington Central Sch. Dist. Board of Educ. v. Murphy*, 548 U.S. at 295; *Schaffer v. Weast*, 546 U.S. 49, 51 (2005)). It provides federal financial assistance for states and local educational agencies that comply with various requirements designed to secure a FAPE for children with disabilities (*Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 179 (1982); *see*, 20 U.S.C. §§1412; 1413).[3]

It is without dispute that Congress has the authority to set and revise the terms upon which it will make federal financial assistance available under its various laws, including the IDEA (548 U.S. at 296). Furthermore, it is within the discretion of Congress to determine who will benefit from the "largesse" of its laws (*see, Regan v. Taxation with*

---

[3] Some of those requirements establish rules for the identification, evaluation and educational placement of children with disabilities (20 U.S.C. §1414), and provide for procedural safeguards that protect the rights of disabled children and their parents under the statute (20 U.S.C. §1415).

Representation of Washington, 461 U.S. at 548-49; *Harris v. McRae*, 448 U.S. at 326).

The limitation on a parent's right to reimbursement at issue herein is but one of several changes first instituted by Congress during the 1997 reauthorization that redefined the IDEA rights of children attending private school. For example, prior to the 1997 reauthorization, the IDEA addressed the subject of children with disabilities in private schools in a subsection that set out the "REQUISITE FEATURES" that needed to be included in the plan that states meeting the IDEA's eligibility requirements must submit to the Secretary of Education (*former* 20 U.S.C. §1413(a)). One of the paragraphs in that subsection required that states:

> (4) Set forth policies and procedures to assure –
>
> (A) that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services; and
>
> (B) that –
>
> (i) children with disabilities in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as

> required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State, and
>
> (ii) in all such circumstances, the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies (*former* 20 U.S.C. §1413(a)(4)).

The 1997 reauthorization removed the above provisions and placed them in a new section regarding state eligibility requirements, and incorporated them, with some changes, within a new paragraph entitled "Children in Private Schools" that remains codified at 20 U.S.C. §1412(a)(10) under the current IDEA as reauthorized in 2004. Whereas the 1997 reauthorization left the text of former section 1413(a)(4)(B) virtually unchanged, it amended the text of former section 1413(a)(4)(A) so as to impose limitations that restricted the availability of IDEA services to private school students to a proportionate share of funds made available by the IDEA. Those amendments read as follows:

> (A) CHILDREN ENROLLED IN PRIVATE SCHOOLS BY THEIR PARENTS – (i) IN GENERAL – To the extent consistent with the number and location of children with disabilities in the State who are enrolled **by their parents** in private elementary and secondary schools, provision is made for the participation of **those** children in the program assisted or carried out under this part by providing for such children special education and related services **in accordance with the following requirements, unless the Secretary has arranged for services for those children under subsection (f):**
>
> **(I) Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this part.**
>
> **(II) Such services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law** (*former* 20 U.S.C. §1412(a)(10)(A)(i)) (emphasis added).

From its early beginnings, the IDEA reflects a history of statutory evolution and adjustments to congressional policy regarding the education of children with disabilities (*see*, *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. at 191-92). At every step, that evolution has been informed by specific findings set forth in the statute itself, and

the national experience regarding implementation of previous requirements (*see*, S. Rep. 105-17, 5 (1997 WL 244967); H.R. Rep. 105-95 (1997 U.S.C.C.A.N. 78, 82)). Each of its reauthorizations has changed prior IDEA requirements.

The limitation on the availability of IDEA services for children in private school and the limitation on a parent's right to reimbursement at issue are part of that evolution. They constitute a departure from prior law, but also represent the articulation of congressional policy regarding the benefits available under the IDEA and the recipients of those benefits. That policy is within the discretion of Congress and must be upheld irrespective of its wisdom (*see*, *Regan v. Taxation with Representation of Washington*, 461 U.S. at 548-49 (1983); *Harris v. McRae*, 448 U.S. at 326 (1980)).

C. Enforcement Of The Plain Language Of 20 U.S.C. §1412(a)(10)(C)(ii) Will Not Produce An Absurd Result.

According to this Court, a literal application of otherwise plain statutory language is not appropriate if the disposition required by the terms of the language is deemed absurd because it "will produce a result demonstrably at odds with the intentions of the drafters" (*United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989)). However, that is not the case herein. As set forth above, 20 U.S.C. §1412(a)(10)(C)(ii) is part of a larger statutory

framework defining the IDEA rights of children in private schools and their parents. Its enactment constituted a proper exercise of congressional authority and discretion regarding who may benefit from federal laws, and the terms and conditions applicable to the receipt of those benefits.

Nonetheless, the Ninth Circuit determined that a literal application of 20 U.S.C. §1412(a)(10)(C)(ii) would lead to an absurd result because it would make parents wait for their child to receive special education from a public school before placing the child in an appropriate private school, even when a school district is uncooperative and its special education services inappropriate. In addition, the Ninth Circuit noted that where a school district determines not to classify a child as disabled, that child "would *never* receive special education in public school and therefore would *never* be eligible for reimbursement . . . " (523 F.3d 1078 at 1087).

However, the statutory language at issue herein initially "ensures that a parent's rejection of a public school placement is not based on mere speculation as to whether the recommended school placement would have been appropriate" (*Board of Educ. of City Sch. Dist. of City of New York v. Tom F.*, 2005 WL 22866, at *3 (S.D.N.Y. Jan. 4, 2005)). Furthermore, the IDEA affords parents the right to challenge a district's determination to not classify their child as a child with a disability eligible for services under the statute (20 U.S.C. §1415(b)(6)). Thus, the Ninth Circuit's fear of a child languishing in a public school without

redress or opportunity to ever receive special education services is unfounded.

Moreover, as discussed below, the legislative history of 20 U.S.C. §1412(a)(10)(C)(ii) establishes that its adoption was part of an effort by Congress to resolve the problem of escalating litigation (S. Rep. 105-17, 13 (1997 WL 244967); H.R. Rep. 105-95 (1997 U.S.C.C.A.N. 78, 90)). Nothing precludes Congress from addressing within the statute fiscal considerations associated with the implementation of the IDEA (*see*, *Arlington Central Sch. Dist. Board of Educ. v. Murphy*, 548 U.S. at 303).

II. The History Of 20 U.S.C. §1412(a)(10)(C)(ii) Supports Enforcement Of Its Plain Language.

As set forth above, 20 U.S.C. §1412(a)(10)(C)(ii) was first incorporated into the IDEA during the 1997 reauthorization of the statute. From the beginning, a primary concern of the IDEA has been to ensure the availability of a FAPE to all children with disabilities. However, the 1997 reauthorization marked a change in the statute's emphasis which was redirected at ensuring greater access to the general curriculum for students with disabilities and that efforts to educate disabled children are effective.

As indicated by accompanying Senate and House Reports, Congress viewed the 1997 reauthorization "as an opportunity to review, strengthen, and improve IDEA to better educate children with disabilities and

enable them to achieve a quality education . . . " (S. Rep. 105-17, 5 (1997 WL 244967); H.R. Rep. 105-95 (1997 U.S.C.C.A.N. 78, 82)).

One of the ways in which Congress expected the 1997 reauthorization to realize that opportunity was by "assisting educational agencies in addressing the costs of improving special education and related services to children with disabilities . . . " (*Id.*). Another was "to clarify the responsibility of public school districts to children with disabilities who are placed by their parents in private schools" and yet another to "resolve a number of issues that [had] been the subject of an increasing amount of litigation in the last few years" (S. Rep. 105-17, 13 (1997 WL 244967); H.R. Rep. 105-95 (1997 U.S.C.C.A.N. 78, 90)).

It is beyond dispute that, ever since this Court's *Burlington* decision, litigation over tuition reimbursement has comprised a large majority of special education cases. Neither can it be disputed that the cost of litigation, in addition to the actual reimbursement of tuition, can significantly drain the limited resources available to school districts to ensure that children with disabilities not only have access to a FAPE, but also can achieve a quality education. Thus, it was appropriate for Congress to address these problems within the IDEA itself. As this Court has indicated, "[t]he IDEA . . . does not seek to promote [its over-arching] goals at the expense of all other considerations, including fiscal considerations" (*Arlington Central Sch. Dist. Board of Educ. v. Murphy*, 548 U.S. at 303). The contested

language was specifically designed to curtail a proliferating cost problem that impedes a school district's ability to maximize use of the limited federal funds available to adequately educate disabled children.

The consequences of enforcing the plain language of 20 U.S.C. §1412(a)(10)(C)(ii) might be viewed by some as severe. But they are no more harsh than those imposed by contemporaneously enacted limitations on the right of children with disabilities unilaterally enrolled by their parents in private schools to participate in programs assisted or carried out under the IDEA. Notwithstanding the IDEA's overarching goal of ensuring that all children with disabilities have access to a FAPE, the 1997 reauthorization provided at 20 U.S.C. §1412(a)(10)(A)(i) that the amount of IDEA funds school districts must expend for the provision of services to children unilaterally enrolled by their parents in private school is limited to a proportionate share of those funds. Federal IDEA regulations adopted to implement the 1997 reauthorization further specified that children with disabilities unilaterally enrolled by their parents in private school have no individual right to some or all of the services they would receive if enrolled in a public school (*former* 34 C.F.R. §§300.454(a)(1); 300.455(a)(2),(3)). Neither do they have an individual right to a due process hearing to challenge any of the services the public school actually offers (*former* 34 C.F.R. §300.457). Instead, decisions about which children will receive services and what services will be provided to them are made by public school

officials in consultation with representatives of private school children with disabilities (*former* 34 C.F.R. §300.454(a)(2), (b), (c)). Complaints about the services provided are filed with the state educational agency (*former* 34 C.F.R. §300.457). The 2004 reauthorization and its implementing regulations continue the 1997 statutory and regulatory scheme (20 U.S.C. §1412(a)(10)(A)(iii); 34 C.F.R. §§300.130-150).

Thus, it is clear from the history of its incorporation into the IDEA that the statutory language at issue herein should be upheld and enforced. The decision of the Ninth Circuit should be reversed. A contrary result would contravene the plain language of the statute and the intent of its drafters. It would negatively affect the ability of school districts to provide appropriate educational opportunities to all of their students.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

JAY WORONA
(*Counsel of Record*)
PILAR SOKOL
NEW YORK STATE SCHOOL
BOARDS ASSN.
24 Century Hill Drive, Suite 200
Latham, New York 12110-2125
(518) 783-0200

March, 2009

AMICUS CURIAE BRIEF

122 (12)

No. 08-305

Supreme Court, U.S.
FILED
MAR 4 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,
Petitioner,

v.

T.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE U.S. CONFERENCE OF MAYORS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DONALD B. AYER
CHARLES T. KOTUBY, JR.
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

RICHARD RUDA *
MICHAEL HUANG
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the *Amici Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BOTH 4DA8LC

925B 25

QUESTION PRESENTED

Whether the Individuals with Disabilities Education Act permits a tuition reimbursement award against a school district and in favor of parents who unilaterally place their child in private school, where the child had not previously received special education and related services under the authority of a public agency.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. UNDER THE STATUTE'S PLAIN LANGUAGE AND STRUCTURE, PARENTS WHO UNILATERALLY PLACE CHILDREN IN PRIVATE SCHOOL HAVE A RIGHT TO TUITION REIMBURSEMENT ONLY WHERE THE CHILD HAS PREVIOUSLY RECEIVED SPECIAL EDUCATION SERVICES UNDER THE AUTHORITY OF A PUBLIC AGENCY 5

A. Section 1412(a) Defines the Obligations of States Receiving IDEA Funding, Including, in Section 1412(a)(10), Their Obligations Concerning Children Enrolled in Private Schools 5

1. Under Subparagraph 1412(a)(10)(A), States Generally Owe a Reduced Set of Obligations, Not Including a FAPE, To Students Enrolled In Private Schools 7

TABLE OF CONTENTS
(continued)

Page

2. Under Subparagraph 1412(a)(10)(B), The State Must Provide a FAPE, and Thus Pay the Costs of Private Education, Where The Child Is Placed In The Private School At The Initiative Of The Public Agency 8

3. Under Subparagraph 1412(a)(10)(C), The State Can Be Required to Pay The Costs of Private Education Even Where The Public Agency Disputes The Placement, But Only Where The Limitations and Conditions of That Subparagraph Are Satisfied 9

B. If Reimbursement Cannot Be Justified Under Section 1412(a)(10), As The Respondent And the Court Below Conceded, It Cannot Be Justified Under Section 1415 13

II. READING SECTION 1412(a)(10) IN A MANNER CONSISTENT WITH ITS LANGUAGE AND STRUCTURE DOES NOT LEAD TO ABSURD RESULTS 16

CONCLUSION 18

TABLE OF AUTHORITIES

Cases **Page**

Andrus v. Glover Constr. Co., 446 U.S. 608 (1980) 15

Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993) 1, 7, 11, 12, 15

Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987) 11

K.R. v. Anderson Cmty. Sch. Corp., 125 F.3d 1017 (7th Cir. 1997)..... 8

Massachusetts v. Morash, 490 U.S. 107 (1989) 5

Otte v. United States, 419 U.S. 43 (1974)..... 11

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 5

Schaffer v. Weast, 546 U.S. 49 (2006) 16

Smith v. United States, 508 U.S. 223 (1993) 5, 13

South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498 (1986) 10

United States v. Menasche, 348 U.S. 528 (1955) 10

United States v. Smith, 499 U.S. 160 (1981) 15

United States v. Wilson, 503 U.S. 329 (1993) 11

United States Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365 (1988)..... 13

TABLE OF AUTHORITIES
(continued)

Page

Statutes & Regulations

20 U.S.C. § 1412(a)(1) 2, 6, 14
20 U.S.C. § 1412(a)(4) 6
20 U.S.C. § 1412(a)(6) 6
20 U.S.C. § 1412(a)(10)(A) 2, 7, 8, 11
20 U.S.C. § 1412(a)(10)(B) 2, 8, 9, 14
20 U.S.C. § 1412(a)(10)(C) 3, 9, 10, 11, 13, 14, 15
20 U.S.C. § 1415(a) 14
20 U.S.C. § 1415(b)(1) 17
20 U.S.C. § 1415(b)(7) 17
20 U.S.C. § 1415(i)(2)(A) 14, 17
20 U.S.C. § 1415(i)(2)(C) 4, 14, 15
34 C.F.R. § 76.652(b) 7
34 C.F.R. § 76.652(c) 7, 8
34 C.F.R. § 300.2(c) 9
34 C.F.R. § 300.131 7
34 C.F.R. § 300.133 8
34 C.F.R. § 300.137(a) 7
34 C.F.R. § 300.138 7
34 C.F.R. § 300.140(a) 8
34 C.F.R. § 300.140(b) 8
34 C.F.R. § 300.148 12
34 C.F.R. § 300.320 6
34 C.F.R. § 300.322 6

TABLE OF AUTHORITIES
(continued)

Page

34 C.F.R. §§ 300.500, *et seq.* 6

34 C.F.R. § 300.501 6

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] Legal issues concerning the provision of primary and secondary education are of singular fiscal and social importance to *amici*. Public education is the largest expenditure of state and local governments. The judgment of the court of appeals seriously disrupts the planning and implementation of special education programs for the millions of disabled children served by public schools. By ruling that respondent can seek reimbursement for private school tuition when his parents did not even notify, much less cooperate with, public school special education experts as required by IDEA, the holding below will divert funds from achieving the statute's purpose—effective special education of millions of disabled children.

As this Court has repeatedly noted, it is Congress' intent that "IDEA's promise of a 'free appropriate education' for disabled children would normally be met by . . . education in the regular public schools or in private schools chosen jointly by school officials and parents." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 12 (1993). Because of the importance to *amici* and their members of ensuring that Congress' goals for the education of the nation's

---

[1] Counsel for the parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

disabled children are honored, *amici* submit this brief to assist the Court in its resolution of the case.

SUMMARY OF ARGUMENT

I. The language and overall structure of 20 U.S.C. § 1412 is purposeful and clear, and carefully define the States' obligations to disabled children. To be eligible for federal funding under IDEA, States must satisfy particular requirements set forth in subsection 1412(a). Among many other enumerated obligations, States must provide a "free appropriate public education" ("FAPE") to all disabled children enrolled in public school. 20 U.S.C. § 1412(a)(1).

Paragraph 1412(a)(10) addresses directly the obligations that a State owes to "[c]hildren in private schools." Subparagraph 1412(a)(10)(A) establishes the general rule, subject to certain defined exceptions, that disabled children "enrolled in private school by their parents," are entitled to receive from the State a more limited collection of services—not the equivalent of a FAPE—that are specifically defined in the subparagraph.

One defined exception to that general rule arises, under subparagraph 1412(a)(10)(B), where the State "place[s]" or "refer[s]" the student to private school. In that event, under the express language of clause (i), the State must provide "an individualized education program, at no cost to the[] parents." Accordingly, where the State places the child in the private school, it is obligated to provide a FAPE and the full gamut of rights and procedures under the statute, including the cost of the education.

A second exception to the rule of reduced obligations owed to children in private schools is

provided in subparagraph 1412(a)(10)(C), which comes into play where the parents desire a particular private placement and the school district does not concur. By its terms, in clause (i), the statute states that there is no obligation on the State to "pay for the cost of education" where the State made a FAPE "available to the child and the parents elected to place the child in such private school" anyway. In clause (ii), the statute states that tuition reimbursement may be available to parents "*who previously received special education and related services under the authority of a public agency*" (emphasis added), where certain other requirements, including the inappropriateness of the IEP provided, are met.

As the court below concedes, Pet. App. 16a, the only reasonable reading of the "who previously received" language of § 1412(a)(10)(C)(ii) is as a threshold condition to the award of tuition reimbursement under subparagraph (C). To read it in any other way makes that language entirely without consequence.

Moreover, the language surrounding § 1412(a)(10)(C)(ii) also supports this plain meaning. Later within the same subparagraph, the statute speaks of certain limits on reimbursement claims which reflect the premise that the child was pursuing special education services in public school prior to his removal. The recurrent nature of this language, all reflecting this same premise, makes clear that its use was not accidental.

The court below does not quarrel with this plain meaning of the statute as excluding reimbursement under subparagraph 1412(a)(10)(C), but nevertheless

justifies tuition reimbursement under very general language appearing in subparagraph 1415(i)(2)(C). That language authorizes a court to "grant such relief as [it] determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). To say that it allows tuition reimbursement for children in private schools which cannot be justified under paragraph 1412(a)(10) would sunder the logical structure of the statute, which confers funding benefits in exchange for acceptance of defined obligations. Paragraph 1412(a)(10) carefully defines the States' obligations to parents of students in private schools. The Ninth Circuit's ruling allows the imposition of any other obligations that a district judge may deem "appropriate," contrary to the express limitations Congress placed on tuition reimbursement claims in 1997.

II. Reading paragraph 1412(a)(10) in a manner consistent with its language and structure does not lead to absurd results. The Ninth Circuit's concern that respondent and those like him will be forced to "indefinitely" acquiesce to an inappropriate placement finds no support in the record, and runs contrary to this Court's consistent teachings that we should assume public school officials act appropriately absent evidence to the contrary. The similar concern that public schools could purposely deny IDEA eligibility to those like respondent, and thereby deny them *both* a FAPE *and* a tuition reimbursement claim, is illusory. Congress enacted comprehensive procedural devices in the IDEA to ensure that all eligible children are properly identified through a cooperative and objective process. These statutory procedures, and not a hasty unilateral withdrawal from the public school and

appeal to the judiciary's equitable powers, is how Congress' envisioned these concerns would be addressed.

ARGUMENT

I. UNDER THE STATUTE'S PLAIN LANGUAGE AND STRUCTURE, PARENTS WHO UNILATERALLY PLACE CHILDREN IN PRIVATE SCHOOL HAVE A RIGHT TO TUITION REIMBURSEMENT ONLY WHERE THE CHILD HAS PREVIOUSLY RECEIVED SPECIAL EDUCATION SERVICES UNDER THE AUTHORITY OF A PUBLIC AGENCY.

"Statutory construction . . . is a holistic endeavor." *Smith v. United States*, 508 U.S. 223, 233 (1993) (internal quotation marks omitted). "'[I]n expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law.'" *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)) (second brackets and ellipse in original). The language and overall structure of 20 U.S.C. § 1412 are purposeful and clear, and carefully define the States' obligations to disabled children in public and private schools.

A. Section 1412(a) Defines the Obligations of States Receiving IDEA Funding, Including, in Section 1412(a)(10), Their Obligations Concerning Children Enrolled in Private Schools.

Section 1412 of IDEA is aptly titled "State eligibility." Subsection (a) of that provision says that

a "State is eligible for [federal IDEA funds] if [it] . . . provides assurances to the Secretary [of Education]" that it has adequate "policies and procedures" with respect to twenty-five separate issues (§§ 1412(a)-(y)). These policies and procedures must be satisfied by a State's treatment of children with disabilities residing within its borders.

Most of the twenty-five issues concern children enrolled in *public* schools. For instance, a disabled child enrolled in public school in a state that receives IDEA funds has an individual right to a "free appropriate public education" ("FAPE"). *See* 20 U.S.C. § 1412(a)(1). This right is ensured through the use of an Individualized Education Program ("IEP"). *See id.* § 1412(a)(4); 34 C.F.R. § 300.320. The public agency "must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate" in the formulation of the IEP. 34 C.F.R. §§ 300.322, 300.501. If not satisfied, those parents have numerous "procedural safeguards," including independent administrative and judicial review of the IEP. *See* 20 U.S.C. § 1412(a)(6); 34 C.F.R. §§ 300.500 *et seq*.

One of the twenty-five paragraphs of § 1412(a) concerns *private* school students. Paragraph 1412(a)(10) addresses the States' special obligations to "[c]hildren in private schools." This provision exhaustively addresses the required "policies and procedures" States owe to private school students—no matter how, when and why they were enrolled there.

1. *Under Subparagraph 1412(a)(10)(A), States Generally Owe a Reduced Set of Obligations, Not Including a FAPE, To Students Enrolled In Private Schools.*

Unlike the broad entitlement given to public school students (*see supra* § I.A.), in general "children enrolled in private school by their parents" have *no individual right* to a "free appropriate public education." *Florence County,* 510 U.S. at 13. They are entitled only to more limited, expressly defined "services" from their public school district, *see* 20 U.S.C. § 1412(a)(10)(A), and have no "individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. § 300.137(a).

The obligations owed by States to disabled students placed in private schools by their parents are discussed at length in the statute. *First*, each public agency must locate, identify, and evaluate all private school children residing in its district. 20 U.S.C. § 1412(a)(10)(A)(ii) (the "child-find requirement"); 34 C.F.R. § 300.131. *Second*, the public agency must create a "services plan" of special education and related services and reasonably accommodate students to participate in that plan. 20 U.S.C. § 1412(a)(10)(A)(i); 34 C.F.R. §§, 300.137-38. *Third*, the agency must consult with private school representatives and parents in the development of the services plan. 20 U.S.C. § 1412(a)(10)(A)(iii); 34 C.F.R.§ 76.652(b)-(c). *Fourth*, when the district is making the final decisions with respect to the student's services plan, parents need only be provided an "opportunity to express their views," 34

C.F.R. § 76.652(c), rather than a full due process hearing. *Id.* § 300.140(a).[2]

Quite importantly, in addition, States need only provide these students with services that can be purchased with a proportionate amount of the federal funds that they receive under IDEA. 20 U.S.C. § 1412(a)(10)(A)(i)(I)-(II); 34 C.F.R. § 300.133. The intent of § 1412(a)(10) has been consistently articulated by the courts of appeals: IDEA does "not require a public school to make comparable provisions for a disabled student voluntarily attending private school as for disabled public school students." *K.R. v. Anderson Cmty. Sch. Corp.*, 125 F.3d 1017, 1018 (7th Cir. 1997).

2. *Under Subparagraph 1412(a)(10)(B), The State Must Provide a FAPE, and Thus Pay the Costs of Private Education, Where The Child Is Placed In The Private School At The Initiative Of The Public Agency.*

Sometimes a public school district will "place[]" or "refer[]" a disabled child to a private school because it deems such a placement the best "means of carrying out the requirements" of the IDEA for that particular child. When it does so, the school district still has the responsibility of ensuring that IDEA standards are upheld as if the child were in public school. 20 U.S.C. § 1412(a)(10)(B)(ii) (referring public agency must ensure that the private school "meet[s] standards that apply to [public] educational agencies"); *see also*

---

[2] A parent may request a due process hearing, but only to challenge a public agency's satisfaction of its "child find" obligations. 34 C.F.R. § 300.140(b).

34 C.F.R. § 300.2(c). These children "have all the rights the children would have if served by [public] agencies," 20 U.S.C. § 1412(a)(10)(B)(ii), and their private placement comes "at no cost to their parents." *Id.* § 1412(a)(10)(B)(i). Thus, when the public agency directs the enrollment of a child in private school, it is responsible for the costs, and oversight, of the child's education.

3. *Under Subparagraph 1412(a)(10)(C), The State Can Be Required to Pay The Costs of Private Education Even Where The Public Agency Disputes The Placement, But Only Where The Limitations and Conditions of That Subparagraph Are Satisfied.*

Parents and public school districts do not always agree on a disabled child's placement, and the IDEA is explicit in defining the situations in which the State will be responsible for private school tuition which it did not suggest or agree with. That subject is addressed at some length in subparagraph 1412(a)(10)(C). Clause (ii) within that subparagraph provides:

> If parents of a child with a disability, *who previously received special education and related services under the authority of a public agency,* enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free

> appropriate public education available to the child in a timely manner prior to that enrollment.

20 U.S.C. § 1412(a)(10)(C)(ii) (emphasis added). On its face, this language appears to create a limited opportunity for parents of children unilaterally placed in private schools to secure private school tuition reimbursement, even where the State opposes the private placement. That opportunity appears to apply only to parents whose child "previously received special education and related services" from the public school, where it is determined by a court or hearing officer that the public school failed to make "a FAPE available . . . in a timely manner prior to" enrollment in the private school.

As the Ninth Circuit acknowledged, it is unreasonable to read this language in any other way. *See* Pet. App. 16a. To read the provision otherwise, and permit reimbursement to parents who have unilaterally placed their child in private school without previously sending their child to public school, would give the "previously received" clause *no meaning at all*. This Court has long been reluctant to read statutes in a way that makes certain language "mere surplusage." *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986) (a "statute should be interpreted so as not to render one part inoperative") (internal quotation marks omitted); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (internal quotation marks omitted).

Other language within subparagraph (C) supports the view that the "previously received" clause

establishes a condition to securing tuition reimbursement. *First*, Congress' use of the past tense throughout that provision demonstrates that reimbursement depends on the child's previous public placement. *See, e.g.*, *United States v. Wilson*, 503 U.S. 329, 333 (1993) ("Congress' use of a verb tense is significant in construing statutes."); *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found. Inc.*, 484 U.S. 49, 59 (1987) (same); *Otte v. United States*, 419 U.S. 43, 49-50 (1974) (same). Subparagraph (C)(i) states that reimbursement is not available when the public agency

> *made* a free appropriate public education available to the child and the parents *elected* to place the child in [a] private school or facility.

20 U.S.C. § 1412(a)(10)(C)(i) (emphasis added). Similarly, subparagraph (C)(ii) makes reimbursement available when the public agency

> *had not made* a free appropriate public education available to the child in a timely manner *prior* to [their] enrollment [in a private school].

Id. § 1412(a)(10)(C)(ii) (emphasis added).

By using the operative verbs in the past and past perfect tenses, Congress indicated that the *existence* of the State's obligation to provide a FAPE—as well as its subsequent failure to do so—is a condition precedent to reimbursement for private school tuition. Because the State is not generally obligated to provide a FAPE to children in private schools, 20 U.S.C. § 1412(a)(10)(A); *Florence County*, 510 U.S. at 13-14, it necessarily follows that parents of children

unilaterally enrolled in private schools are not entitled to reimbursement.[3]

Second, IDEA's "limitations" on reimbursement support this conclusion. While subparagraph (C)(ii) authorizes reimbursement for certain privately-placed children, the next clause (iii) states that "[t]he cost of reimbursement described in clause (ii) may be reduced or denied . . . if":

> (I) . . . at the most recent *IEP meeting* that the parents attended *prior to removal of the child from the public school*, the parents did not inform the IEP team that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and intent to enroll their child in a private school at public expense; or . . . 10 business days . . . *prior to the removal of the child from the public school*, the parents did not give written notice to the public agency . . .; [or]
>
> (II) . . . *prior to the parents' removal of the child from the public school*, the public agency informed the parents . . . of its intent to

---

[3] The applicable regulations confirm this construction. The section dealing with private school reimbursement is entitled "Children With Disabilities Enrolled By Their Parents in Private School *When [A] FAPE Is At Issue*." 34 C.F.R. § 300.148 (emphasis added). Because privately placed students are not entitled to either an IEP or the FAPE which the IEP is designed to achieve, *see Florence County*, 510 U.S. at 13, these regulations support the view that a parent who enrolls the child in private school before a public agency determines that the child is entitled to special education is not entitled to tuition reimbursement.

> evaluate the child . . . , but the parents did not make the child available for such evaluation.

20 U.S.C. § 1412(a)(10)(C)(iii)(I)-(II) (emphases added). This limitation applies to all reimbursement claims "described in clause (ii)," and read together with that clause, reinforces the conclusion that prior enrollment in public school is a precondition for tuition reimbursement. Specifically, an IEP meeting must occur, and notice of parental discontent must be given, "*prior to removal of the child from public school*" and before the parents make good on their "*intent to enroll their child in private school.*" The upshot of this language leaves little room for debate: previous public school enrollment was viewed by Congress as a precondition for tuition reimbursement.

A claim for tuition reimbursement for such children is a narrow exception to the general rule of non-reimbursement where a parent unilaterally and voluntary places their child in private school. Strictly construing the exception to the general rule of non-reimbursement is the "'only . . . permissible meaning[] [of the provision that] produces a substantive effect that is compatible with the rest of the law.'" *Smith v. United States*, 508 U.S. 223, 233 (1993) (quoting *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)).

B. If Reimbursement Cannot Be Justified Under Section 1412(a)(10), As The Respondent And the Court Below Conceded, It Cannot Be Justified Under Section 1415.

Respondent in this case has conceded that "he does not meet the statutory requirements under 20

U.S.C. § 1412(a)(1)(C), because he had not 'previously received special education and related services'" in public school. Pet. App. 11a. The district court agreed with that conclusion, *id.*, as did the Ninth Circuit. *Id.* 16a ("Because T.A. never received special education and related services [from the petitioner], § 1412(a)(1)(C) does not apply in this case."). Instead, the Ninth Circuit held that "reimbursement may be sought . . . if at all, only under principles of equity pursuant to § 1415(i)(2)(C)." *Id.*

Section 1415 requires States to guarantee parents certain "procedural safeguards with respect to the provision of a free appropriate public education." 20 U.S.C. § 1415(a). Among them are the "right to bring a civil action" by "[a]ny party aggrieved by the findings and decision made" in a due process hearing. *Id.* § 1415(i)(2)(A). In such an action, the court is directed to "grant such relief as [it] determines is appropriate." *Id.* § 1415(i)(2)(C)(iii). The Ninth Circuit grounded respondent's request for tuition reimbursement in this last phrase.

To allow this general provision to govern reimbursement requests by parents who unilaterally enroll their children in private schools prior to receiving special education in public school would expand the States' statutory obligations beyond those defined by Paragraph 1412(a)(10). IDEA contains two, carefully-defined exceptions to the general rule that States are not required to pay tuition for disabled students enrolled in private school. *See infra* §§ I.A.2. & 3. (discussing 20 U.S.C. § 1412(a)(10)(B) and (C)). The Ninth Circuit's reasoning, however, would create a *third* category of private school students entitled to tuition reimbursement—students who never received special

education services in the public school, but who may still win public funding by seeking and then disputing the adequacy of an IEP created by the public school district.

Subparagraph 1415(i)(2)(C) would become the broadest of all the exceptions. Parents who have *always* sent their children to private school could simply contact their local public school, request an IEP, reject and litigate the propriety of that IEP, all in the hope that a court will grant them tuition reimbursement from the public school under "the principles of equity." The generally-worded text of subparagraph 1415(i)(2)(C) cannot justify this result. "'Where Congress explicitly enumerates certain exceptions to a general [rule], additional exceptions are not to be implied.'" *United States v. Smith*, 499 U.S. 160, 167 (1981) (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)).

The disconnect between this "equitable" exception and the rest of § 1412(a)(10) would also sanction perverse incentives. Subparagraph 1412(a)(10)(C) makes time limits on withdrawal from the public school and cooperative interactions with school officials relevant to (or even dispositive of) a reimbursement claim when the private placement is without the consent of the public school. *See supra* § I.A.3. Parents who choose private school for their children at the outset would be naturally exempt from these provisions and, consequently, could seek tuition reimbursement more easily than parents who follow the IDEA scheme in good faith. Bypassing the system would be rewarded over working within the system to achieve IDEA's core goal of "normally" educating disabled children "in the regular public schools." *Florence County*, 510 U.S. at 12.

II. READING SECTION 1412(a)(10) IN A MANNER CONSISTENT WITH ITS LANGUAGE AND STRUCTURE DOES NOT LEAD TO ABSURD RESULTS.

The Ninth Circuit adopted a strained reading of Section 1415 because, in its view, denying reimbursement here would lead to the "absurd result that the parents of a child with a disability must wait (an indefinite, perhaps lengthy period) until the child has received special education in public school before sending the child to an appropriate public school, no matter how uncooperative the school district and no matter how inappropriate the special education." Pet. App. 15a-16a. Not only is there no evidence of this problem in respondent's case, there is likewise no evidence that this sort of situation is anything but exceedingly rare.

Predicting this result on mere supposition, moreover, reflects a cynical contempt for the expertise of public school special education specialists that is directly contrary to this Court's teachings. As *Schaffer v. Weast* made clear, this Court cannot "assume that every IEP is invalid until the school district demonstrates that it is not. The Act does not support this conclusion. IDEA relies heavily upon the expertise of school districts to meet its goals." 546 U.S. 49, 59 (2006); *id.* at 62-63 (Stevens, J., concurring) (joining opinion of the Court "because I believe that we should presume that public school officials are properly performing their difficult responsibilities under this important statute").

The Ninth Circuit also feared that a plain reading of § 1412(a)(10) would shut-out those students who "the school district declined to recognize . . . as

disabled." Pet. App. 16a. Those students, the court feared, would "*never* receive special education in public school and therefore would *never* be eligible for reimbursement." *Id.* (emphasis in original). A disagreement among a parent and a school district on a disability determination, however, is thoroughly addressed by the IDEA. Parents have the right to seek their own independent educational evaluation, 20 U.S.C. § 1415(b)(1), to present the disagreement among the evaluators at a due process hearing, *id.* § 1415(b)(7), and receive judicial review of the outcome, *id.* § 1415(i)(2). These procedural rights mitigate the unfounded fear that a student will be left without neither a FAPE nor a reimbursement claim simply because the parties disagree on the existence (or identification) of his or her particular disability. It certainly does not follow that a parent having this disagreement can forego the procedural safeguards set forth in the Act, dodge the limitations that accompany those safeguards, remove their child from private school and appeal to the unbounded judicial discretion of § 1415 to claim full reimbursement for their child's private education. IDEA is much too detailed to sanction this *ad hoc* result.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

DONALD B. AYER
CHARLES T. KOTUBY, JR.
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

RICHARD RUDA*
MICHAEL HUANG
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 309
Washington D.C. 20001
(202) 434-4850

* Counsel of Record for the *Amici Curiae*

March 4, 2009